80-704

Supreme Court, U.S.
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MICHAEL RODAK

NO. 80-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al.,

Appellees-Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Appellants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October 30, 1980

QUESTION PRESENTED

Should the United States Court of Appeals for the Seventh Circuit be permitted to review the district court's refusal to vacate its preliminary injunction, where the injunction which the district court refused to vacate is already before this Court on direct review under 28 U.S.C. §1252, and where review by the Seventh Circuit would create a serious risk of inconsistent and duplicative adjudications by this Court and the Court of Appeals.[1]

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[1]The Petitioners are: William M. Gibbons, Trustee of the Chicago, Rock Island and Pacific Railroad Company ("Trustee"), The First National Bank of Chicago and Continental Illinois National Bank and Trust Company of Chicago, as Indenture Trustees, and Henry Crown, et al., substantial holders of first mortgage bonds, income debentures and common stock of the Chicago, Rock Island and Pacific Railroad Company ("Creditors"). All of the Petitioners have actively participated in these proceedings in the district court, and are appellees in the RLEA's appeal to the Court of Appeals and in the appeals pending before this Court.

The Railway Labor Executives Association ("RLEA") is the appellant in the appeal before the United States Court of Appeals for the Seventh Circuit, No. 80-2487, from the district court's Order of October 15, 1980. RLEA intervened as a defendant on June 9, 1980 in the district court, and is the appellant in an appeal to this Court of the district court's June 9, 1980 injunction. *RLEA* v. *Gibbons, et al., appeal docketed*, No. 80-415 (U.S. S. Ct., September 15, 1980).

The United States, the Interstate Commerce Commission and Secretary of Transportation Neil Goldschmidt were defendants in the original district court action. They have taken an appeal of the June 9, 1980 injunction to this Court. That appeal has not been docketed. Petitioners are advised that the Government intends to join the appeal to the Court of Appeals.

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Appellants-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTRODUCTORY STATEMENT

Petitioners pray that this Court issue a writ of certiorari to review and *affirm* the district court's Order of October 15, 1980, prior to judgment by the Court of Appeals. The appeal which Petitioners ask this Court to review was taken to the United States Court of Appeals for the Seventh Circuit by the Respondent Railway Labor Executives' Association ("RLEA"), from the denial of RLEA's Motion to Vacate a Preliminary Injunction issued by District Judge Frank J. McGarr. That injunction was already before this Court on direct appeals by the RLEA, the

United States and the Interstate Commerce Commission ("Commission") under 28 U.S.C. §1252.

OPINIONS BELOW

Judge McGarr's statements from the bench on October 7, 1980 after oral argument on the Motions to Vacate appear at Appendix A (*infra*, App. pp. a-1, *et seq.*). Judge McGarr's Order of October 15, 1980, as supplemented by the Order of October 16, 1980, by which he denied the RLEA's Motion to Vacate the Preliminary Injunction of June 9, 1980, appears at Appendix B (*infra*, App. pp. b-1, *et seq.*).

Judge McGarr's statements from the bench on June 9, 1980 after oral argument on the Motion for a Preliminary Injunction and Declaratory Judgment appear at Appendix C (*infra*, App. pp. c-1, *et seq.*). Judge McGarr's initial Preliminary Injunction and Declaratory Judgment of June 9, 1980, from which RLEA has appealed to this Court, appears at Appendix D (*infra*, App. pp. d-1, *et seq.*). Judge McGarr's statements from the bench on June 20, 1980, when he denied the Motion to Reconsider filed by the United States and the Interstate Commerce Commission, which was joined by the RLEA, appear at Appendix E (*infra*, App. pp. e-1, *et seq.*).

JURISDICTION

Judge McGarr entered his Preliminary Injunction on June 9, 1980. Judge McGarr declined to alter the injunction, as requested by the United States, the Interstate Commerce Commission and the RLEA, on June 20, 1980. The RLEA's Notice of Appeal to this Court under 28 U.S.C. §1252 was filed on June 11, 1980, and docketed on September 15, 1980. *RLEA* v. *Gibbons, appeal docketed*, No. 80-415 (U.S. S. Ct., September 15, 1980), and appears at Appendix F (*infra*, App. p. f-1). A Notice of Appeal to this Court under 28 U.S.C. §1252 was filed by the United States, the

Interstate Commerce Commission and the Secretary of Transportation on July 8, 1980, and appears at Appendix G (*infra*, App. pp. g-1, *et seq.*).

The Order of Judge McGarr denying the RLEA's motion to vacate was entered on October 15, 1980. Notwithstanding the pendency of the appeals before this Court, the RLEA filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit on October 16, 1980, which appears at Appendix H (*infra*, App. pp. h-1, *et seq.*).

This Court has jurisdiction of the RLEA's appeal of the October 15, 1980 order under 28 U.S.C. §1252, by which all subsequent appeals of matters already on appeal to this Court under that statute are to be taken to this Court.

This Court also has jurisdiction to grant a writ of certiorari before judgment by the Court of Appeals under 28 U.S.C. §1254(1) and 28 U.S.C. §2101(e).[2]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution, upon which Judge McGarr relied in issuing his injunction of June 9, 1980 and denying the Motions to Vacate on October 15, 1980, provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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[2]On October 25, 1980, the Petitioners filed in the Court of Appeals a Motion to Dismiss Or Certify The Question On Appeal To The United States Supreme Court. The Motion to Dismiss was grounded on lack of jurisdiction in the Court of Appeals under 28 U.S.C. §1252. The Motion to Certify was grounded on the authority of 28 U.S.C. §1254(3), which permits the Court of Appeals to certify to this Court isolated questions of law as to which guidance is desired.

Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C. §§1005, 1008 ("Rock Island Act"), appear at Appendix I (*infra*, App. pp. i-1, *et seq.*).

The amendments to the Rock Island Act of the National Rail Transportation Policy Act of 1980, Pub. L. No. 96-448, H. R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), Title VIII, Section 701, *reprinted in* 96th Cong. Rec. H. 9911-12 (daily ed. Sept. 29, 1980) ("Staggers Rail Act"), appear at Appendix J (*infra*, App. pp. j-1, *et seq.*).

STATEMENT OF THE CASE

Judge Frank J. McGarr, of the United States District Court for the Northern District of Illinois, has exercised jurisdiction over the Rock Island's reorganization and liquidation proceedings under Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205, since 1975. On January 25, 1980, in response to the urgings of the Rock Island creditors and the recommendations of the Federal Railway Administration and the Court's independent expert, Judge McGarr ordered the liquidation of the Rock Island estate on the ground that its reorganization as an operating railroad was no longer possible. On June 2, 1980, Judge McGarr reaffirmed his January 25 ruling and confirmed the systemwide abandonment of the Rock Island.

Upon signature by the President on May 30, 1980, the Rock Island Transition and Employee Assistance Act became effective. Sections 106 and 110 of the Rock Island Act impose up to $75,000,000 in new labor protection obligations on the Rock Island estate. The statute compels the Trustee to fund the new employee protection obligations directly from the assets of the estate or through federal loans. The Act mandates that the reorganization court must accord cost of administration status to the expense of this labor protection scheme.

On June 9, 1980, Judge McGarr declared the Rock Island Act to be unconstitutional, and enjoined its implementation. He based his ruling on the ground that the Act would work a taking of the estate's property in violation of the Fifth Amendment to the United States Constitution, by imposing a new $75,000,000 obligation on the estate to achieve a purported public purpose. He found that the Act's taking would cause irreparable harm to the Rock Island estate, through disruption of the estate's liquidation and a clear violation of the estate's Fifth Amendment rights. Judge McGarr enjoined the Government and the Interstate Commerce Commission from implementing the Act and the Trustee from complying with it. The United States and the Commission subsequently filed a Motion to Reconsider before Judge McGarr, which was joined by the RLEA. After the filing of briefs and oral argument, Judge McGarr denied the motion on June 20, 1980.

On June 11, 1980, the RLEA filed with the District Court a Notice of Appeal to this Court pursuant to 28 U.S.C. §1252. The RLEA filed its Jurisdictional Statement and docketed its appeal on September 15, 1980. The Government filed a Notice of Appeal to this Court on July 8, 1980. That appeal has not yet been docketed.

On June 21, 1980, the RLEA filed an application addressed to Justice Stevens as Circuit Justice, for a stay of Judge McGarr's June 9 injunction. That application was joined by the Government. In a memorandum opinion, Justice Stevens denied the application for a stay. *RLEA* v. *Gibbons*, No. 80-415, *appeal docketed*, Sept. 15, 1980, 100 S. Ct. 2668 (Stevens, Circuit Justice, June 28, 1980). This Court subsequently sustained Justice Stevens' denial of RLEA's stay motion. *RLEA* v. *Gibbons*, supra, 100 S. Ct. 3057 (July 2, 1980).

On September 29, 1980, Congress passed certain amendments to the Rock Island Act as part of the Staggers Rail Act of 1980. These amendments reenacted without substantial change Sec-

tions 106 and 110 of the Rock Island Act, which contain the basic labor protection scheme of the Rock Island Act. The amendments establish a shorter time period than was contained in the original version of the Act for the formulation of a plan and the imposition of labor protection obligations on the Rock Island estate (fifteen rather than thirty days). In addition, Section 124 prescribes certain procedures for judicial review which operate only prospectively. The new Section 124(c) of the Act provides that a possible later remedy under the Tucker Act is not precluded by any of the Rock Island Act's provisions. The Staggers Rail Act amendments do not alter the $75,000,000 labor protection obligation imposed on the estate by the original Rock Island Act. Further, the amendments contain no acknowledgement that compensation for the property taken from the estate is owed by the government.

Based upon these amendments, on October 6, 1980, the Government, the Commission and the RLEA requested Judge McGarr to vacate his earlier order declaring the Rock Island Act unconstitutional, and to lift his outstanding injunction.[3] Judge McGarr found that the Staggers Rail Act amendments failed to cure the Rock Island Act's basic constitutional infirmities, describing the Act's changes as "cosmetic." (Transcript of Proceedings, October 7, 1980 (*infra*, App. A at a-2). After hearing oral argument on October 7, 1980, Judge McGarr commented:

> This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction.

Transcript of Proceedings, October 7, 1980, at page 31 (*infra*, App. A at a-3).

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[3]Although the Act was not signed into law until October 14, 1980, the Motions to Vacate were filed on October 6, 1980, and oral argument was heard on October 7, 1980, in anticipation that the Act would be signed. The Trustee and Creditors subsequently filed a brief in response to the motions, and the RLEA and the Government filed reply briefs. Judge McGarr's Order denying the motions was entered on October 15, 1980.

On October 15, 1980, after the Staggers Rail Act was signed into law, Judge McGarr ruled consistently with his earlier comments from the bench. He found that the Rock Island Act continued to expose the estate to irreparable harm, and determined that his previous injunction still governed proceedings under the Act. He refused to vacate his earlier order and determined:

> Pursuant to the requests for relief in the written filings and arguments of counsel the court orders the continuance of the preliminary injunction.

Order, October 15, 1980 (*infra*, App. B at b-3).

On October 16, 1980, RLEA filed a Notice of Appeal from the October 15 Order to the United States Court of Appeals for the Seventh Circuit (*infra*, App. H at h-1).

The law of this case as stated by Judge McGarr on October 15, 1980, is that the amended Rock Island Act is fundamentally a reenactment of the same unconstitutional taking that resulted from the original Rock Island Act. The validity of Judge McGarr's initial ruling as to the constitutionality of the Rock Island Act is now before this Court, and underlies the validity of the Order of October 15, 1980. Thus, the appeal to the Seventh Circuit as to which certiorari is now sought is brought from a subsequent order concerning the *same statute* and the *same injunction* as to which the RLEA and the Government have already invoked this Court's jurisdiction under 28 U.S.C. §1252.

The Trustee and Creditors submit that 28 U.S.C. §1252 and the usual considerations of judicial economy and consistency governing writs of certiorari before judgment by courts of appeals, require that the subsidiary question of law raised on RLEA's appeal of the October 15, 1980 Order to the Seventh Circuit should be determined by this Court. That review should occur in the same proceeding in which this Court will review

Judge McGarr's determination of June 9, 1980 as to the constitutionality of the Rock Island Act. The Trustee and Creditors state the following reasons in support of this Petititon for a Writ of Certiorari to the Seventh Circuit prior to that Court's judgment on the RLEA's appeal of the October 15 Order:

1. An appeal in this matter has been taken to and is pending before this Court pursuant to 28 U.S.C. §1252. That statute requires that this Court retain exclusive jurisdiction over the entire matter.

2. Avoidance of inconsistent adjudications and piecemeal appellate review, judicial economy and the intent of Congress to expedite adjudication of the constitutionality of the Rock Island Act, mandate that the sole issue raised in this appeal should be determined in a single, comprehensive proceeding, with the issues which underlie it in the direct appeal already pending before this Court.

Moreover, in an effort to comply with the extraordinarily short period for review apparently required by the amended Rock Island Act, the Court of Appeals has scheduled extremely early briefing and argument of this appeal. Briefing on the merits is to be completed by November 11, 1980, and oral argument has been set for November 13, 1980. Therefore, to enable the Petitioners, the Court of Appeals and this Court to avoid unnecessary and duplicative efforts, and to avoid the serious due process problems presented by this curtailed schedule, the Petitioners respectfully request that this Petition be ruled upon on an emergency basis, prior to oral argument in the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I.

A. Because A Direct Appeal Has Been Taken To This Court Pursuant to 28 U.S.C. §1252, Jurisdiction Over RLEA's Subsequent Appeal Lies Only In This Court.

The Trustee and Creditors submit that the only issue which the RLEA could raise before the Court of Appeals must be governed

by determination of the underlying questions concerning the Rock Island's constitutionality, which are already before this Court. That issue may be stated as follows:

> Does the addition of the new Section 124(c) of the Rock Island Act which states that '[n]othing in this Act . . . shall limit the right of any person to commence an action . . . under . . . the Tucker Act', or any other amendment to the Rock Island Act, correct the Act's unconstitutionality under the due process and governmental takings provisions of the Fifth Amendment to the United States Constitution?

Clearly, this issue is subsidiary to the issues regarding the constitutional validity of the original Rock Island Act which are before this Court on appeal. Moreover, any decision by the Court of Appeals regarding this subsidiary question cannot dispose of the issues already before this Court.

The statutory provision under which the RLEA filed its initial appeal of Judge McGarr's June 9, 1980 injunction before this Court requires that RLEA's appeal of the subsidiary order of October 15, 1980 must be treated as already before this Court. 28 U.S.C. §1252 expressly provides:

> A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.

In *United States* v. *Raines*, 362 U.S. 17, 27 n. 7 (1960), this Court noted that "the broad nature of §1252" indicates the "desire of Congress that the whole case come up." Professor Moore explained the statute's purpose in his comment concerning *Raines*:

> Clearly the Court was construing §1252 in a manner to avoid piecemeal appeals. This construction seems true to the congressional intent since §1252 specifically provides that subsequent, prior, and cross appeals shall be taken to the Supreme Court by any party who has received notice of appeal under §1252.

12 *Moore's Federal Practice* §411.23 (2d ed. 1980). *See also*, R. Stern and E. Gressman, *Supreme Court Practice*, (5th ed. 1978) ["Stern and Gressman"] at 79.

In sum, the appeals to the Supreme Court under 28 U.S.C. §1252 have invoked this Court's power over *all* issues raised in this subsequent appeal. Section 1252 requires that the jurisdiction of this Court may be deemed to have been invoked as to this collateral appeal by the taking of the initial appeal to this Court. Having chosen to pursue appellate review under a statute which requires that all subsequent appeals must be brought to the Supreme Court, the RLEA should be bound by that decision for purposes of this subsequent appeal of a collateral order. Moreover, by moving to vacate Judge McGarr's June 9, 1980 Order before proceeding under the amended Rock Island Act, the Government and the RLEA have implicitly conceded that the amended Rock Island Act is not new legislation. By the terms of Judge McGarr's October 15 Order, the injunction now appealed from is the same June 9, 1980 injunction that is already before this Court.

Thus, this Court should grant the writ of certiorari to give effect to the statutory mandate of 28 U.S.C. §1252.

B. Section 124 Of The Rock Island Act, As Amended, Does Not Affect The Supreme Court's Jurisdiction In This Matter.

Section 701(a)(1) of the Staggers Rail Act of 1980 amends Section 124(a) of the Rock Island Act to provide, in pertinent part, as follows:

> Sec. 124(a) Notwithstanding any other provision of law, any appeal from—
>
> (1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act;
>
> . . .
>
> shall be taken to the United States Court of Appeals for the Seventh Circuit.

The Trustee and Creditors submit that this prospective language does not govern this appeal, which had been docketed in this

Court before the statute was enacted. The prospective language of the new Section 124(c) cannot be read to divest this Court of jurisdiction over that pending appeal.

The view, apparently adopted by the RLEA, that the Staggers Rail Act amendments were intended to strip this Court of jurisdiction over a pending appeal raises fundamental issues concerning the constitutional separation of powers and due process principles. *See, e.g., Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Certainly, the prospective language of the Act cannot be read as evidence that Congress intended to take the extraordinary step of divesting the Supreme Court of jurisdiction in an already docketed appeal.[4] More express language than that of the Rock Island Act amendments is required to infer this extreme intent.

In *McLucas* v. *DeChamplain*, 421 U.S. 21, 31-32 (1975), this Court held that: "an appeal under §1252 brings before us, not only the constitutional question, but the whole case . . . , including threshold issues of subject matter jurisdiction." (Citations omitted.) This reading is consistent with other determinations as to the purpose of Section 1252. *See, e.g., United States* v. *Raines, supra,* 362 U.S. at 20. Thus, if an issue as to proper appellate jurisdiction has arisen through this subsequent Congressional action, or

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[4] The legislative history of the Rock Island Act and the Explanatory Statement of the Conference Committee published on the date of the Act's passage indicate that Congress was aware that appeals of the June 9, 1980 order were pending in the Supreme Court. See Joint Explanatory Statement of the Committee of Conference, *infra*, App. J at j-5. However, the amendment to Section 124(a) of the Rock Island Act, which requires only that *subsequent* appeals be filed before this Court, was passed by the House of Representatives on September 9, 1980, before the RLEA docketed its appeal to this Court on September 15, 1980. That section remained unchanged and was passed by both Houses of Congress without further comment, in the final version of the Act passed on September 29, 1980. Thus, nothing in the Act's legislative history indicates that the amendments were intended to strip the Supreme Court of jurisdiction over already docketed appeals.

because an appeal was taken to the Court of Appeals, that issue must be decided by this Court, along with other issues raised in the initial appeal. If an issue as to potential conflict between the jurisdictional allocation of 28 U.S.C. §1252 and the Staggers Rail Act amendments has arisen, *McLucas* v. *DeChamplain, supra,* plainly indicates that those issues, like others in this appeal, are now before this Court as a result of RLEA's previous appeal under 28 U.S.C. §1252.[5]

II.

If This Court Determines That The Court Of Appeals May Have Jurisdiction Over This Appeal, It Should Grant This Petition Under The General Principles Governing Writs Of Certiorari Before Judgment.

If, contrary to the argument in Part I of this Petition, this Court determines that the RLEA's appeal was properly taken to the Court of Appeals under Section 124(a) of the amended Rock Island Act, then this Court should exercise its ordinary jurisdiction under 28 U.S.C. §1254(1) and §2101(e) to grant certiorari

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[5]There are authorities which suggest that Congress may constitutionally alter the Supreme Court's jurisdiction over a pending appeal. See, e.g., Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1868). However, those authorities are inapposite here and have been drawn into question by courts and commentators. In his dissent in Glidden v. Zdanok, 370 U.S. 530, 605 n.1-11 (1962), Justice Douglas wrote: "[t]here is a serious question whether the *McCardle* case could command a majority view today." See also, e.g., R. Berger, *Congress v. The Supreme Court* 286 (1969).

Moreover, in United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), Congress was declared to be without power to withdraw jurisdiction where that withdrawal would amount to a rule of decision in a pending case. In this case, if Section 124 of the Rock Island Act is construed as a withdrawal of Supreme Court jurisdiction, the principles outlined in *Klein* would be violated.

before judgment, based upon the principles which normally govern such writs.[6]

This Court's power to grant writs of certiorari before judgment in cases pending in the Courts of Appeals derives from two separate provisions of the Judicial Code. 28 U.S.C. §1254 provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. . . .[7]

Similarly, 28 U.S.C. §2101(e) provides as follows:

> An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

The purposes served by these statutes are identical to those which underlie Section 1252's requirement that all subsequent or cross appeals must be brought to the Supreme Court after a direct

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[6]The language of Section 124(a) requires only that appeals from future orders with regard to the constitutionality of the Rock Island Act be taken to the United States Court of Appeals for the Seventh Circuit. It has no effect on this Court's power to grant a writ of certiorari before judgment once such an appeal has been taken.

[7]The Trustee and Creditors were parties to the proceedings before Judge McGarr and are appellees in the RLEA's appeal to the Court of Appeals and in the appeals of the RLEA and the Government to this Court. The language of Section 1254(1) specifically permits *any party* to the proceedings below, even if successful, to petition for a writ of certiorari to a court of appeals before judgment, once an appeal has been taken by another party to a court of appeals. See, e.g., United States v. Bankers Trust Co., 294 U.S. 240, 243 (1935); United States v. United Mine Workers, 330 U.S. 258 (1947); Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952); Stern and Gressman, *supra* 57-58. Thus, the Trustee and Creditors clearly have standing to bring this Petition, although successful in the district court.

appeal has been brought under Section 1252. These purposes include the prompt resolution of important constitutional questions, and consistency and economy in the allocation of judicial resources. Stern and Gressman have explained the application of the power to grant certiorari before judgment:

> The Court has exercised this power not only in cases of great public emergency but also in situations where similar or identical issues of importance are already pending before the Court and where it is considered desirable to review simultaneously the questions posed in the case still pending in the court of appeals.

Stern and Gressman, *supra,* 55-56.

Cases in which this Court has granted certiorari prior to decision by courts of appeals evidence the purposes which such review has served. For example, in granting an application for certiorari in *United States* v. *Thomas*, 361 U.S. 950, 950-951 (1960), the Court stated:

> It appears . . . that the issues raised in No. 64, *United States* v. *Raines*, now pending on appeal in this Court, are pertinent to the disposition of this case. In view of this and of the fact that the issues raised by this application are closely related to those involved in the merits of the controversy now before the Court of Appeals, the Court believes that the entire matter should be considered at one time.

See also, *e.g.*, *Hannah* v. *Larche*, 363 U.S. 420, 422 n. 3 (1960); *Porter* v. *Dicken*, 328 U.S. 252, 254 (1946). In *Rickert Rice Mills, Inc.* v. *Fontenot*, 297 U.S. 110 (1936), this Court had earlier held a statutory taxing provision unconstitutional and upheld an injunction against its implementation. Congress had amended the statute in an attempt to cure its constitutional infirmities. This Court granted certiorari before judgment by the Court of Appeals. The Court found that the statute's unconstitutionality

was not cured by the statutory amendments and ordered the issuance of an injunction to prevent the collection of the tax. In *Brown* v. *Board of Education*, 344 U.S. 1, 3 (1952), the Court took judicial notice of the case of *Bolling* v. *Sharpe*, then pending in the Court of Appeals for the District of Columbia, and invited the filing of a petition for certiorari before judgment to consider issues similar to those pending in *Brown. Bolling* v. *Sharpe*, 344 U.S. 873 (1952).

Supreme Court Rule 18 (1980 Revisions), requires a showing of public importance to support the issuance of a writ of certiorari before judgment. Rule 18 provides:

> A petition for a writ of certiorari to review a case pending in a federal court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court.

(Citations omitted.)

Throughout these proceedings, the RLEA has argued that this litigation presents issues of great public importance. See, *e.g.*, Jurisdictional Statement, *RLEA* v. *Gibbons*, *supra* (U.S. S.Ct., September 15, 1980). The Trustee and Creditors agree that the delay and disruption in the liquidation of the Rock Island estate caused by the imminent loss of $75,000,000 of the estate's assets is of pressing importance. They submit that the clear infringement of the Rock Island's constitutional due process and property rights contemplated by the Act is also a matter of public importance. Moreover, the Staggers Rail Act's amendment to Section 124(b) of the Rock Island Act, which requires the Court of Appeals to "render a final decision no later than 60 days after the date" of filing of the last appeal concerning the Act's constitutionality, reflects Congressional awareness of the public importance

of these appeals. In addition, the important constitutional issues raised in these appeals are clearly ripe for review by this Court, and the delay and confusion which would be caused by an additional layer of review is clearly unwarranted. *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer* (*Steel Seizure Case*), 343 U.S. 579, 585 (1952).

As has already been pointed out in this Petititon, Judge McGarr ruled on October 15 that the Staggers Rail Act's amendments on which the RLEA based its Motion to Vacate worked no fundamental change in the Rock Island Act. Thus, the basic questions as to the Act's constitutionality which were determined in favor of the Trustee and Creditors by Judge McGarr on June 9 and June 20, 1980, and preliminarily by Justice Stevens on June 28, 1980, were not altered by Judge McGarr's ruling on October 15, 1980. If the RLEA's appeal was properly brought to the Court of Appeals, the issues raised on that appeal must be limited to those not raised in the appeal already docketed before this Court. Any determination by the Court of Appeals as to the issue before it must be governed by this Court's determination of the issues which underlie that limited question. Conversely, the determination of the Court of Appeals on the subsidiary issue presented for its review cannot dispose of the more fundamental questions before this Court. Thus, efficient allocation of judicial resources requires that this Court review the subsidiary issue concerning the Rock Island Act amendments in the same proceeding in which it determines the constitutionality of the initial Rock Island Act.

The significant questions regarding the Rock Island Act's constitutionality sought to be raised before the Court of Appeals are already before this Court. Moreover, Supreme Court review is likely to be sought of any Court of Appeals decision. Therefore, the Congressional intent of prompt adjudication of the constitutional issues raised in this appeal would best be served by a single, comprehensive review of these proceedings in this Court.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that this Court should grant their Petition for a Writ of Certiorari to the United States Court of Appeals prior to judgment by that Court and *affirm* the Orders of the United States District Court for the Northern District of Illinois of June 9 and October 15, 1980.

Respectfully submitted,

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October 30, 1980

APPENDIX A

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS OCTOBER 7, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause, before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Tuesday, October 7, 1980, at the hour of 2:00 o'clock p.m.

* * *

THE COURT: I think I should make some comments on this.

As has been pointed out, it is in effect, a discussion of problems created by a law that is not yet a law but which will very probably become one soon. For that reason, I think the discussion is appropriate.

What I have before me, to be more precise about it, is motions by three parties to vacate a preliminary injunction, which I entered on June 9th, 1980. I have listened to the arguments on this. I have formed some tentative opinions. I don't really intend to rule on those motions because everybody is entitled to a little more chance to develop the matter with themselves and with me, and, of course, we should wait until it becomes a reality. I think these observations of mine are pertinent only because of the suggestion of Mr. Rush that I might find his position so appealing that I

would agree now that the Commerce Commission is correct in regarding my former injunctive order as not binding upon them because this is in effect new and different legislation. I want to make my position clear so that there is no misunderstanding between myself and Mr. Rush and/or the Commission.

Actually, as has been adverted to, the basic vice of the Act which I held unconstitutional was the imposition of the cost of the Rock Island Rehabilitation Act on the Estate and thus on the creditors. I issued a preliminary injunction basically because I found the Act unconstitutional and thought it was my duty to enjoin the carrying out of the programs set forth by Congress seeking the unconstitutional goals that I found.

We had discussions of whether a preliminary injunction was issuable, and we discussed the traditional irreparable injury concept that goes with that determination. I did issue the preliminary injunction accompanied by a finding, among other things, that there was irreparable injury. The bill, as I now see it, amends and attempts to cure some of the procedural problems with the Act which was before me in an effort to remove the irreparable injury argument concerning the old Act. The new bill does not address the basic finding of the Court that the whole program which has been changed only cosmetically, to borrow somebody else's word, was an unconstitutional deprivation. I held that and an appeal is in progress. The argument that the Tucker Act is available and therefore we could go ahead with the unconstitutional taking because the Tucker Act will allow everything to turn out in the end really does not impress me. I share Mr. Moritz' comment, or argument, that you do not proceed, nor must the Court allow proceedings under what is patently unconstitutional legislation because there is a remedy somewhere down the line that may straighten things out. It really is not at all clear to me that to disperse the money now, to allow the claim against the assets of the Rock Island to accrue, to say to the Trustee that if this is all un-

constitutional you can sue under the Tucker Act and get it back, is even to cure the irreparable harm argument. Mr. Murray argued that the very fact of the existence of the $75 million lien on the assets of the Rock Island is irreparable injury as it overshadows the efforts of the Trustee to continue the liquidation process relying, as he must, on the ability and willingness of people to extend credit under cost of administration terms.

So, as I said, my initial impression without ruling on it is that the new bill does not cure the old problem.

Mr. Rush asks me to agree that it is new legislation so that the old injunction, which he has moved to vacate is no longer binding on the Commission, and I would like to make it clear that I do not agree. This is not new legislation in my view. This is amended legislation which attempts, but fails, to clear the underlying flaws which caused me to find the bill unconstitutional in the first place. It remains basically the same law with the same defects and is subject to the same injunction. So, while I am not ruling on the motion to vacate the injunction because I would like the parties to have an opportunity to develop the matters as fully as they wish before me, I am making these comments to make it clear that I do not agree with the Commerce Commission's suggestions that the injunction is no longer binding on them.

I think what we had better do, gentlemen, is to allow the various people opposing the motion to file some very quick responses, and then give Justice, the Commerce Commission and Mr. Clarke an opportunity to reply so that they will have a chance to air their views on it.

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 15, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY,

Debtor,

WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation,

Defendants.

No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the motion of intervenor Railway Labor Executives Association ("RLEA"), requesting this court [to] vacate the preliminary injunction issued on June 9, 1980, enjoining enforcement of sections 106 and 110 of the Rock

Island Transition and Employee Assistance Act ("Rock Island Act" or the "Act"), 45 U.S.C. §§1005, 1008, on the grounds that all constitutional defects have been remedied by passage of the Railroad Transportation Policy Act of 1980 ("Staggers Rail Act of 1980"), H.R. Rep. 1430, 126 Cong. Rec.-House 9892 (Sept. 29, 1980). The trustee and certain creditors also seek a declaratory judgment and injunctive relief declaring the Rock Island Act as amended by the Staggers Rail Act, unconstitutional and enjoining its enforcement. In anticipation that the Staggers Rail Act would be signed into law, the court heard arguments on October 7, 1980, from all interested parties, addressed to the effect of the Staggers Rail Act on the court's preliminary injunction.

This court issued a preliminary injunction on June 9, 1980, when, based upon findings of fact and conclusions of law delivered from the bench, the court concluded that "the probability of determination of unconstitutionality of this Act after more mature consideration and deliberation is exceedingly great. . . ." Transcript of Proceedings, June 9, 1980 at 81. Specifically, the injunction prevented the Interstate Commerce Commission and the Secretary of Transportation from imposing a $75,000,000 loan with cost of administration status on the bankrupt estate. These proceeds were to fund a labor protection arrangement created under the Act. This determination was based upon the court's finding that the provisions of the Act mandated a taking of private property of the estate without compensation, in violation of the fifth amendment.

On June 28, 1980, United States Justice John Paul Stevens denied RLEA's motion for a stay of this court's injunction.

The Staggers Rail Act became law on October 14, 1980. It amends certain provisions of the Rock Island Act and re-enacts the labor protection obligations previously found unconstitutional by this court. The re-enacted labor protection requirements

appear to be essentially the same as under the original Act except that the time available for the trustee and the Commission to respond is shortened and the anti-stay provisions of section 106 have been eliminated.

This court has studied the Staggers Rail Act amendments to the Rock Island Act, has reviewed carefully the arguments of counsel, the documents filed by the various parties, the ruling of June 9, 1980, and the court's knowledge of these proceedings, and it remains clear that the Rock Island estate continues to be exposed to irreparable injury by the provisions of the Rock Island Act as amended by the Staggers Rail Act. The Staggers Rail Act does not cure the defects found in the Rock Island Act. Like its predecessor, the Staggers Rail Act imposes a $75,000,000 cost of administration claim on the Rock Island estate with priority over claims of general creditors and shareholders on the assets of the estate.

Petitioner argues that the statutory scheme can be implemented, the money disbursed, and the validity of the program and extent of the Rock Island liability to finance it, later litigated. This, in fact, cannot be done without irreparable injury to the administration of the estate for the benefit of the creditors. The trustee is currently liquidating assets and preparing the plan for distribution to creditors. Under court order, the trustee is also preparing an interim plan for the immediate partial satisfaction of cost of administration claims. The imposition of a $75,000,000 uncertainty on the estate will totally halt the liquidation for the long period consumed by the appellate process, with irreparable injury to the already long-suffering creditors. Further, the whole liquidation plan will be distorted by the brooding omnipresence of a potential liability representing a significant percentage of the total assets.

Pursuant to the requests for relief in the written filings and arguments of counsel, the court orders the issuance of a preliminary injunction.

1) The Rock Island Act as amended and re-enacted by the Staggers Rail Act effects an unconstitutional taking of private property in violation of the rights of the Rock Island estate, its creditors and shareholders which are secured by the Fifth Amendment of the United States Constitution.

2) The implementation of this Act will constitute irreparable harm to the estate.

3) The court's injunction of June 9, 1980 remains in full force and applies to sections 106 and 110 of the Rock Island Act, as amended and re-enacted by the Staggers Rail Act.

4) The court orders the issuance of a preliminary injunction:

a) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

b) preliminarily enjoining the trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any labor protection agreement under the Rock Island Act as amended and re-enacted by the Staggers Rail Act; and

c) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act as amended and re-enacted by the Staggers Rail Act.

ENTER:

FRANK J. MCGARR

United States District Judge

DATED: October 15, 1980

ORDER OF THE UNITED STATES DISTRICT COURT OCTOBER 16, 1980

The Preliminary Injunction entered October 15, 1980 is hereby corrected as follows:

1) p. 1, lines 1 and 2 [p. b-1, lines 1 and 2 and first two words of line 3] should read: "This matter is before the court on the motion of intervenor Railway Labor Executives Association ('RLEA'), joined by the United States and the Interstate Commerce Commission, requesting this court. . . ."

2) p. 3, line 13 [p. b-3, lines 14 and 15] should read: ". . . Island estate with priority over claims of creditors and. . . ."

3) p. 4, line 4 [p. b-3, line 32] should read: ". . . arguments of counsel, the court orders the continuance of the preliminary. . . ."

4) p. 4, line 16 [p. b-4, line 11] should read: "4) The court orders the continuance of the preliminary injunction: . . ."

APPENDIX C

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom, in the United States Courthouse, Chicago, Illinois, on Monday the 9th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: I don't think a response will be necessary, in light of the time, as we've gone well into the lunch hour. I have a matter at 2:00 o'clock that will take all afternoon. I indicated at the conclusion of the argument I would indicate my ruling on the application filed by the Trustee and the creditors this morning, it's my intention now to do so, if I can get the many notes I made in some form of order.

It's of no news to anybody here interested in this case that for well over four years, closer to five years, I guess, I have been trying to balance the public interest against the rights of the creditors, that I have sanctioned the continued operations of the Rock Island towards the end of an anticipated an [d] hoped for reorganization. Events indicated down the line, and I accepted as inevitable, the fact that that effort had and would continue to fail, and therefore

recently, in view of that conclusion, I ordered the termination of operations and the abandonment of the Rock Island operation. The Commerce Commission agreed with me, and after hearing that, I entered the final order, and we do not now have before us, for any consideration, an operating railroad.

The basic thrust and historical mission of the Commerce Commission is to oversee the operations of railroads, not their liquidation, and to oversee the terms and conditions in this case of contracts entered into with other railroads to continue to operate segments of the Rock Island, if any such agreement is reached. This jurisdiction, however, is basically over the new operating entity, the Rock Island not being an operating entity.

I have before me today an application for a declaratory judgment that has to do with a statute recently enacted and an attack upon its constitutionality, and in argument there has been adverted to, and I have in front of me, the text of the preamble to that statute, the Rock Island, Section 102, and the preamble indicates the pursuit of Congress of the interest of seeking the uninterrupted continuation of services over Rock Island lines, dependent as it is, and I'm not reading, I'm paraphrasing, an adequate employee protection provision, covering Rock Island Railroad employees who are not hired by other railroads.

There is in that, and the following three paragraphs of the preamble, a basic illogic, a basic contradiction which I'm at a loss to understand. What the statute addresses itself to is labor protection for those employees who will not be absorbed by whatever segments of the Rock Island are continuing to operate, and therefore the purpose of uninterrupted continuation of services over Rock Island Lines, as part of the preamble to this statute, remains to those persons arguing it, and to me, something of a mystery. The important thing to remember is that whatever public purpose and public interest there remains in this case is the problem of the

other carriers and the Interstate Commerce Commission and the on-going supervision by the I.C.C. of the operations of the other carriers over Rock Island Lines that they may have acquired. But, the Rock Island is a bankrupt corporation with no more operations, nothing left but assets and creditors and liquidation. Whatever obligations it may have to labor, it must arrive out of a contract that it had with labor, and any appropriate claims of labor under existing bankruptcy law is under the Railroad Retirement Act or any other statute which operates to fix the rights of labor. There are pension rights, I assume, there may be wage claims that can be resolved. But, these are all based upon existing law, existing rights, existing contracts, and that Congress believes that it can legislate a $75 million labor protection burden on the assets of the Rock Island comes to me as a startling concept. That the Government will lend or the FRA will lend the $75 million is irrelevant in the face of the fact that obviously that becomes a claim against the Estate in derogation of the rights of the creditors in whatever assets the Estate now has.

I'm not aware that it has ever been held that Congress can single out a private industry in bankruptcy and legislate for this single company only labor-management rights. I'm aware that in the Milwaukee Act something of that nature seems to have been done. I'm not sure that I agree with Judge McMillen and his conclusions, but neither do I disagree, because his situation is so different than the one before me that I don't find it analogous. The Milwaukee continues to operate, the Milwaukee has problems the Rock Island doesn't have, and the Milwaukee is in a situation the Rock Island is not in.

It seems to me clear, without the necessity of a great deal of argument, that the Rock Island Act, which is the subject of our deliberations today, is an unconstitutional taking, an unconstitutional deprivation of the property rights of the creditors. It seems to be thus in two respects at least, and probably more, but the

labor protection aspect of it, which has been argued today at some length, and in addition, the curious procedural deprivation of the ordinary rights of adjudication and appeal of decision affecting the property rights of creditors in a bankruptcy case.

The labor protection scheme, however, is central to the legislation, and its infirmities are sufficient basis for the ruling that I intend to make today. But, while this is true, there are other aspects of the legislation that I have adverted to of dubious constitutionality. One I have mentioned is the strangely trunkated [*sic*] appellate procedure. The second, including the deprivation of the Trustee and the Court and the creditors of their control over and their rights in the Commuter Service for the extended period of two years. This and other problems remain for further consideration. However, and as I've said, the labor protection plan is the central issue of this morning's argument and this morning's determination, and it is enough to warrant the intrusion of the Court into this implementation of this statutory program on constitutional grounds.

I have no lack of faith in the ability of the Seventh Circuit to decide the constitutional issues here. My reservations, however, are as to the procedural anomalies which this statute embodies, setting the matter, apparently in the interest of speed and expedition, upon an exceedingly fast track, which puts a bankruptcy matter in the hands of the I.C.C., expert by definition only in terms of railroad operations, and bypasses the Court which has the primary jurisdiction over bankruptcy matters. The Seventh Circuit, in any event, will review this matter one way or another, and I would not wish it otherwise, but it will only be after an order of this Court barring the intent of this legislation to impose this significant obligation on a bankrupt estate with a statute by-passing the jurisdiction of the Bankruptcy Court in which the case is pending.

Let me comment for a moment on some of the arguments that have been made in opposition to the application of the creditors

and the Trustee. Mr. Broadley and Mr. Rush have argued that it would be appropriate for the Court to let the Trustee respond to the I.C.C.'s request for information, allowing the Commerce Commission to thus formulate the issues and work out a labor protection plan which in the argument of Mr. Broadley, I think it was, might be acceptable to the Court and the Trustee. I know that was Mr. Rush's argument. It might even be much less than the $75 million, it might be $50 million or $25 million. The issues [*sic*] is not whether the I.C.C. can arrive at a labor protection plan which the creditors and the Trustee could live with, even if that plan were to cost the Estate only $1 million. The issue is whether ab initio, the concept of a compelled labor protection plan, paid for out of the Estate, whatever the plan, has any constitutional sanction. We don't have to wait for an I.C.C. determination of the details of the plan to determine that issue.

Mr. Broadley has argued the Lowden case, the Old Rock Island case, a reorganized railroad continuing operations, and that, of course, that phrase, "Continuing operations," is the reason why the Lowden case is not applicable here. In its continuing operations after its earlier reorganization, those continuing operations invoked the continuing jurisdiction of the Commerce Commission. The uniqueness of the situation here is that the Rock Island is not a railroad corporation any longer, it's not an operating railroad, it's a corporation in the business of liquidating real estate and equipment and paying off creditors. The environment of labor protection decisions and precedent and all of the Court's decisions and precedent flowing therefrom has always been the environment of an operating railroad, and that is singularly the environment we no longer have here.

Mr. Clarke argues that there is no more public interest, or there is no more public interest here because, at least within the discretion of the Court, because the legislature, the ultimate repository of decisions on public interest, has spoken and decided what the

public interest is. If Congress sees public interest, of course, Congress may serve that public interest by appropriate legislation which does so with public funds. One of the central issues in this case is and always has been and will be and will continue to be to what extent the private sector, here the creditors and the bondholders, can be saddled with the public interest. Congress may determine public interest, but Congress may not take private property to serve the public interest.

I find that we have an emergency here, there is irreparable harm to the Rock Island and the creditors if this procedure mandated by the Rock Island Act goes forward, that the probability of determination of unconstitutionality of this Act after more mature consideration and deliberations is exceedingly great, and that all the statutory and traditional requirements for emergency relief have been met. The emergency relief sought in the petition before me in Paragraph 1 is a temporary restraining order and a preliminary injunction restraining the Commission from asserting jurisdiction to consider or impose labor protection arrangements as provided by the Rock Island Act; an order on the Trustee not to enter into these negotiations as provided by the Act and requested by the Commerce Commission; and a preliminary injunction restraining the United States Secretary of Transportation from going ahead with the statutorily authorized $75 million loan and consequent obligations on the Rock Island that would flow out of the making of that loan.

Because of the apparent unconstitutionality of this Act, I think this relief is warranted, and its effectuation and implementation must be enjoined, and therefore I will enter an order granting the prayers for relief that I have just summarized in the petition of the Rock Island Railroad, Trustee and the creditors. This is a preliminary injunction, I see no need for a temporary restraining order. I think in the issue of constitutionality of an Act, which we can all read and argue, a temporary restraining order is not

necessary and a preliminary injunction is the order I intend to enter. This, among other things, opens the avenue of appealability, which I think is probably desirable in this case.

I will continue the matter for further argument and further report on the preliminary injunction and for a determination of whether, after I hear whatever additional you have to present, it should be transmuted into a permanent injunction, a final injunctive order and will grant some time for that. I would expect, however, that before that time there will be a movement in the direction of the Court of Appeals, which is why I have made it a preliminary injunction and an appealable order.

I think the way to finalize this is to draw an order which merely contains the prayers for relief in the plaintiff's motion for a preliminary injunction, which I have indicated I'm ready to grant, so I will merely dictate an order which will be available to you gentlemen before the end of the day embodying those three requests for relief and putting them in order form rather than in prayer form.

Is there anything further, gentlemen, that remains to be done?

MR. CLARKE: Your Honor, there's one matter, and that's a question of whether or not in light of the fact that there is no money needed from the Estate for the next 20 days at least, that your Honor stay your order at this time to allow the Interstate Commerce Commission to consider the issue under Section 106(b) of the Act.

THE COURT: Well, actually that's been the thrust of the argument, Mr. Clarke, and Mr. Broadley, Mr. Rush having argued that no harm will be done by the implementation of this Act, and I have not agreed with that, I don't share their views on the subject. I think that the Act is designed, despite argument to the contrary, to take jurisdiction over this matter away from the Bankruptcy

Court, that the Commission is to make its determinations appealable only to the Court of Appeals, that I have no role in that and I think that's one of the unconstitutional aspects of the statute. It has been argued that when all of this has been done, the Trustee will have to come to me for an order approving whatever it is that the Commerce Commission has told him to do. I do not so read the Act, I don't think that's what it says, and therefore to grant your request would merely be to allow to go forward what I have just enjoined, and therefore I deny that motion.

Mr. Broadley, what—

MR. BROADLEY: I was just going to join him in a motion for a stay.

THE COURT: I'll deny the motion for a stay. Gentlemen, I'll get an order out as quickly as I can so all of you have something to go to the Court of Appeals with.

Counsel, you arrived belatedly and you haven't heard most of this. What have you got today?

MR. SCHNEIDERMAN: Your Honor, as I read the draft T.R.O. that was in the papers that we received on Friday afternoon, and as I heard your Honor's statement of what the order would be, do I understand that there is nothing in that order, either requested or entered, that effects the Commuter Service immediately?

THE COURT: That's correct, counsel. I adverted to the fact that that aspect of the statute might be subject to some further scrutiny, but there's not [*sic*] order affecting the Commuter Service entered at this time.

MR. SCHNEIDERMAN: Thank you, your Honor.

THE COURT: Thank you. That will be all, gentlemen.

APPENDIX D

PRELIMINARY INJUNCTION
JUNE 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697

PRELIMINARY INJUNCTION

This matter is before the court on the joint motion of the trustee and creditors of the estate of the Chicago, Rock Island and Pacific Railroad Company. The trustee and creditors have filed a com-

plaint for a declaratory judgment and injunctive relief declaring the Rock Island Railroad Transition and Employee Assistance Act ("the Rock Island Act") (a copy of which is found in H.R. Rep. No. 96-1041, _____Cong. Rec.-House, H3875 (May 20, 1980)) unconstitutional and enjoining its enforcement. The court has reviewed the complaint and motion and their supporting documents and memoranda. In addition, the court has heard arguments of all interested parties.

Pursuant to the requests for relief in the written filings and the arguments of counsel, the court made oral findings from the bench at the conclusion of the arguments heard this day. Those findings need not be restated here. However, pursuant thereto, the court orders the issuance of a preliminary injunction:

1) preliminarily enjoining the Interstate Commerce Commission from asserting jurisdiction to consider or to impose any labor protection arrangement or obligation under the Rock Island Act; and

2) preliminarily enjoining the Trustee, William M. Gibbons, from entering into negotiations respecting any labor protection agreement and from implementing any such labor protection agreement under the Rock Island Act; and

3) preliminarily enjoining the United States Secretary of Transportation from requesting, approving or guaranteeing any loan or obligation on the estate of the Chicago, Rock Island and Pacific Railroad Company under the provisions of the Rock Island Act.

ENTER:

FRANK MCGARR
United States District Judge

Dated: June 9, 1980

APPENDIX E

EXCERPTS FROM THE TRANSCRIPT OF PROCEEDINGS JUNE 20, 1980

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF:
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*
No. 75 B 2697

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled matter before the HONORABLE FRANK J. MCGARR, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, the 20th day of June, 1980, at the hour of 10:00 o'clock a.m.

* * *

THE COURT: The circumstances of this case, in its leaping from crisis to crisis, which seems to be its history, has frequently compelled the litigants to come in, as they did earlier this week, and also as they did last week and today, in order to address emergencies where there is very little time involved, and that has necessarily compelled me to respond in kind, so that I'm constantly issuing opinions orally from the bench after listening to arguments of counsel and after a brief chance, usually overnight, to read some of the very excellent briefs that I've been supplied with.

It occurs to me that I should be embarrassed that every record that goes to the Court of Appeals, instead of presenting what I would hope to be my reasoned and literate opinion, is going up sort of off the cuff on findings and conclusions that the circumstances mandate. But, I guess that's the way it has to be.

In order to illuminate, as best I can, the reasons for the ruling which I intend to announce on this motion, I'd like to make some general comments both on the background of the issue and the issues themselves as they're raised.

I did this the last time, I don't know how well it turned out, but, as I said, the exigencies of time are such that it seems to be the best way to do it.

I've heared a lot of reference today, and always in this case, to the public interest, and Mr. Clarke now argues that it was in the public interest to avoid the harsh consequences upon those terminated employees of the Rock Island which he sees implicit in my order. And it's the argument of the Government that the public interest, which lies generally in the capable hands of the Commerce Commission, is where the public interest should remain and that they should obey the mandate of Congress and implement the plan which Congress so obviously in the public interest wants them to do.

The creditors have listened to the public interest argument for five years and I imagine they grew fairly tired of it fairly early in the game, because, as always, I have tried in this case to balance the public interest against the private rights of the creditors, and one must do that in a case involving a public utility such as a railroad, and which one never does in any other type of a bankruptcy case because it's so extraordinary that it can be argued that the private right of contract can be effected by the public interest to the extent that it has been in this case.

But, the public interest has many aspects. There was always, in the long life of this case, a strong public interest in the continued operation of the Railroad. We came to a time in the case when even the Commerce Commission abandoned that, as did I.

There has always been an employees' interest. No court ever takes lightly the signing of an order, the issuance of an order that

threatens unemployment of a very large number of people, so the employees' interest has been determinative and paramont, and that combination of the public interest and the employees' interest gave the Rock Island five years of operation and the employees five years of employment, which had a different view been taken of the public interest vis a vis the creditors' interest, they might not have had.

As to the creditors' interest, which is contrary to the public interest in this case, we have reached that stage in the administration of the Rock Island where since it's no longer an operating Railroad, it's the creditors' interests that are now paramont and must be served.

I'd like to characterize those creditors for a moment. We are tempted to think of the creditors in this case, because they have been active in the case as banks and bondholders and so forth, but my desk is piled high with letters that I have been receiving for many, many months from small businesses and small taking [taxing] authorities and school districts and from all through the Middle West and the area that the Rock Island serves, telling tales of extreme hardship that have been occasioned by the failure and inability of the Rock Island to pay its bills. These are not giants, they're not banks. They're people upon whom the hardships of the abandonment of the service of the Rock Island and its bankruptcy falls every bit as harshly as the same problems fall on the employees.

What I'm really trying to say, I suppose, is that everyone in this case, as is natural and as is human, approaches it from a single point of view, and I am charged with and have tried hard to see every issue in this case in the light of all of these interests and points of view which I have just discussed.

The statute that we're dealing with today, the Rock Island Transition Act, to give it a shorthand name, exudes concern for

expedition, and it is in that atmosphere that this entire proceeding concerning it has taken place. We have moved rapidly, we have tried to do things rapidly and set up possibilities of appeal rapidly for the reason that the issues are vital and important and all these interests are involved and rapid determination of what must be determined seemed to be in order.

In the order that is the subject of today's petition, I did not, in so many words, adjudicate the unconstitutionality of the Rock Island Transition Act, although my remarks indicated that I certainly believed that it was probably that that would be the ultimate conclusion of the Court were we to go down the route to the final injunctive order. But, I did enter a preliminary injunction prohibiting its implementation on the grounds that we had a genuine emergency, that we had irreparable injury and that we had a reasonable probability of the plaintiffs' success on the arguments as to the unconstitutionality of the Act, in both its substance and in the procedures which it set up.

The unconstitutional aspect of the taking of private property to fund a legislatively created special benefits program for the terminated employees remains, in my mind, after all the argument that I have heard today, still the most single valid constitutional argument addressed to the Rock Island Transition Act. The Rock Island as an operating railroad was suffused with the public interest. But, the Rock Island as a non operating former railroad has lost that character, and therefore, Congress, their approach to it, to the public interest seems to me to misapprehend the fact that what they are dealing with is a private business with a lot of creditors which own some property and which is being liquidated for the benefit of creditors, and that it is not an operating railroad and that the public interest is no longer paramont and that the employees of the railroad, regrettable as it is, are former employees of the Railroad.

Among the rationals that have been developed to justify Government intervention into railroading over the years has been the public interest and peaceful labor relations, and the public interest in the necessity to keep an operating railroad operating. The operating railroad aspect is now gone as a factual basis for the interest of Congress, and if Congress had a sufficiently legitimate public interest in peaceful labor relations, as it asserts, and as it has been argued, as a foundation for what it has done, nothing justifies Congress satisfying the public interest in peaceful labor relations by the taking of private property. The public interest, if it is a real public interest, must be served by public funds.

Mr. Clarke has argued that the money should be paid, the money provided by Congress and by this Act to come from this Estate, that it should be paid to the employees while the legal process goes foreward [*sic*], and he argues that with some considerable persuasion. But in truth, the argument that the funds, if improperly paid, are recoverable under the Tucker Act is a specious argument and if the money is paid to the employees while the legal processes go foreward [*sic*] and if the constitutionality of the Act, or my decision on it, was correct, there is no doubt that there has been irreparable harm to the Estate of the Rock Island.

Neither is it certain in my mind that as a matter of law that I have the final and total control over the disbursement of the funds, as the Government argues, and therefore, I cannot accept that argument as a reliable predicate for the Court's conclusion that there is no irreparable harm possible in this case, because ultimately I will have the last say as to the disbursement of the funds.

With everybody concerned with expedition and everybody arguing for speed, it seems to me that it doesn't matter very much whether the constitutionality of this Act, which is the basic issue we're all concerned with, is adjudicated in the context of an appeal

from my order of a week or so ago, or, as Mr. Rush would have it, after the I.C.C. implements the order and the Rock Island comes to me for an authorization to disburse the funds, which I might be expected to deny if I had the same opinion on constitutionality then as I do now. Or, as Mr. Clarke argues, that after the I.C.C. implements the program and gets set to disburse the funds, that if we handle the appeal expeditiously enough, we may get an order out of the Appellate Court before we get the money out of the Rock Island.

All of those programs and all of those paths lead to the same conclusion, and that is the absolute necessity in the present posture of this case for an appellate determination of the validity of my tentative preliminary conclusion that the Act we are discussing is unconstitutional, and in a pragmatic way, it seems obvious to me that the best way to handle that is in an appeal from the order which I have already entered. The fastest way to resolve it is also in that appeal, and I suppose that's why it's the best way.

It is argued, and the Government is understandably concerned that there is confusion as to where that appeal should go, do we have a Seventh Circuit matter, or do we have a Supreme Court matter. I must confess that the issue is confusing to me and I'm not certain, although I'm sure that you gentlemen have given it much more study and thought than I have.

This is a problem created, however, by the Act itself, as I view it, in its attempt to tamper with the ordinary appellate process, and I say that Congress having created this problem, it leaves me no avenue to resolve it.

In summary, I think since Congress desired expedition here, I have raised questions as to the constitutionality of the legislative plan. The objectors say that there is no irreparable harm, and I disagree with them. If the Act is unconstitutional now, it will be

no less unconstitutional after the I.C.C. implements its plan or after the funds are disbursed, if that's the way that it turns out, and I assume, therefore, that expedition is best served by an appeal from the order that I entered most recently and to allow the appellate determination from there.

So, with some considerable expression of sympathy for the employees of the Rock Island, and concern, and while I don't expect them to accept this, since nobody believes that you tell them something they don't want is for their own good, that even from the employees' point of view the most expeditious course is the one that I have just described and I have just announced.

Therefore, the motion of Messrs. Broadley, Rush and Clarke, or the motion joined in by all of them to vacate the injunctive order of June 9th is denied.

I guess that leaves you on your way to whatever court of appeals you decide you're going to, gentlemen. At least I hope you stay in touch with each other so you meet in the right court.

That will be the order on today's hearing.

MR. CLARKE: Your Honor, would it be possible to just ask one or two questions for clarification?

THE COURT: I'll do my best.

MR. CLARKE: Your Honor, am I correct in concluding that your Honor has concluded tentatively and it's that finding, the tentative finding of law that is the basis of your injunction that the statute is unconstitutional insofar as it requires the taking from the Estate?

THE COURT: It is unconstitutional for more than one reason, and that's one of them.

MR. CLARKE: So we do have a finding on the constitutionality?

THE COURT: Yes. All right, gentlemen—

MR. RUSH: Might I ask a question also, your Honor?

THE COURT: All right.

MR. RUSH: There's been so much argument about it that it becomes a matter of increasing concern as to whether in your June 2nd order you did in fact, as has been argued, intend to rule that the imposition of any labor protection on the Estate could not be done constitutionally, or whether—I guess I simply understood it as you simply held it wasn't required under Section 17 of the Milwaukee Restructuring Act.

THE COURT: I held originally that it was not required under Section 17 of the Milwaukee Restructuring Act. I added, and you have to always bear in mind that it was in the context of the ruling on an application for preliminary relief, that it was my view that it was highly probable that the final outcome of the case would be that any imposition of labor protection by Congress on the Rock Island payable out of the Estate was an unconstitutional taking.

MR. RUSH: Thank you, sir.

THE COURT: All right, gentlemen.

(Which were all of the proceedings had in the above-entitled matter on the day and date aforesaid.)

APPENDIX F

RLEA'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In The Matter Of CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, *Debtor.*	In Proceedings for the Reorganization of a Railroad No. 75 B 2697

NOTICE OF APPEAL

Notice is hereby given that the Railway Labor Executives' Association, an intervenor herein, appeals to the Supreme Court of the United States from a Preliminary Injunction issued at 4:30 p.m. on June 9, 1980, by the United States District Court for the Northern District of Illinois sitting as a Reorganization Court for the Property of the Chicago, Rock Island & Pacific Railroad Company, by which the court, having declared an act of Congress unconstitutional, enjoined the Interstate Commerce Commission, the Trustee and the Secretary of Transportation from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, Pub. L. No. 95-254 (signed May 30, 1980). This appeal is being taken pursuant to 28 U.S.C. §1252.

JOHN O'B. CLARKE, JR.

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Dated: June 11, 1980

APPENDIX G

THE GOVERNMENT'S NOTICE OF APPEAL TO THE UNITED STATES SUPREME COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of: CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	In Proceedings for the Reorganization of a Railroad. No. 75 B 2697

NOTICE OF APPEAL

Notice is hereby given that the defendants United States of America, Interstate Commerce Commission, and Neil Goldschmidt, Secretary of Transportation, appeal to the Supreme Court of the United States from a Preliminary Injunction issued

on June 9, 1980 by the United States District Court for the Northern District of Illinois enjoining the Interstate Commerce Commission, the Secretary of Transportation and the Trustee of the Chicago, Rock Island and Pacific Railroad Company from performing their duties under Sections 106 and 110 of the Rock Island Transition and Employee Assistance Act, P.L. No. 95-254, on the grounds that those sections of the Act were unconstitutional. This appeal is taken pursuant to 28 U.S.C. § 1252.

ALICE DANIEL
Assistant Attorney General

JOHN H. BROADLEY

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OF COUNSEL:

Richard Allen
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Henri Rush
Associate General Counsel

Interstate Commerce Commission

APPENDIX H

RLEA'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,* WILLIAM M. GIBBONS, as Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; and HENRY CROWN, et al., *Plaintiffs,* *v.* THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Defendants.*	No. 75 B 2697 In Proceedings for the Reorganization of a Railroad.

NOTICE OF APPEAL

Notice is hereby given that the Railway Labor Executive's Association, an intervenor herein, appeals to the United States Court of Appeals for the Seventh Circuit from a Preliminary Injunction issued by the United States District Court for the North-

ern District of Illinois on October 15, 1980 by which that Court, sitting as a railroad reorganization court for the Chicago, Rock Island and Pacific Railroad Company, enjoined on constitutional grounds enforcement of Sections 106 and 110 of the Rock Island Transition And Employee Assistance Act, As Amended by the Staggers Rail Act of 1980.

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APPENDIX I

EXCERPTS FROM THE ROCK ISLAND RAILROAD TRANSITION AND EMPLOYEE ASSISTANCE ACT

EMPLOYEE PROTECTION AGREEMENTS

Sec. 106 (a) No later than 10 days after the date of enactment of this Act, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employee of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 10 days after the date of enactment of this Act, the parties shall immediately submit the matter to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with respect to employee protection no later than 30 days after the date of enactment of this Act, unless the Rock Island Railroad and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term "fair and equitable" means no less protective of the interests of employees than protection afforded under section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy

court shall immediately authorize and direct the Rock Island Railroad trustee to, and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

(d) (1) An order of the Commission under subsection (b) of this section may not be stayed by the Commission or by any court, and an order of the bankruptcy court under subsection (c) of this section may not be stayed by any other court.

(2) Any order described in paragraph (1) of this subsection may be appealed only to the court of appeals of the United States having jurisdiction to review decisions and orders of the bankruptcy court. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed. No determination by the court of appeals under this subsection may be reviewed in any other court.

(e) (1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

(2) Benefits and allowances under such agreement or arrangement entered into under this section shall be paid by the Rock Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231(b)(7)) is amended by striking out "and the Milwaukee Railroad Restructuring Act" and inserting in lieu thereof, "the Milwaukee Railroad Restructuring Acts, and the Rock Island Railroad Transition and Employee Assistance Act."

* * *

OBLIGATION GUARANTEES

Sec. 110. (a) The Secretary, under the authority of section 511 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831), shall guarantee obligations of the Rock Island Railroad for purposes of providing employee protection in accordance with the terms of any employee protection agreement or arrangement entered into under section 106 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Rock Island Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Rock Island Railroad in connection with benefits and allowances provided under any employee protection agreement or arrangement entered into under section 106 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement or arrangement entered into under section 106 of this title.

(f) Section 511(g) and section 516 of the Railroad Revitalization and Regulatory Reform Act of 1976 (45 U.S.C. 831(g) and 836) shall not apply to any obligation guaranteed under this section.

APPENDIX J

EXCERPTS FROM THE CONFERENCE REPORT ON THE RAILROAD TRANSPORTATION POLICY ACT OF 1980 (AMENDMENTS TO THE ROCK ISLAND ACT)

TITLE VII—MISCELLANEOUS PROVISIONS
Rock Island and Milwaukee Railroads Amendments

Sec. 701. (a)(1) The Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1001 et seq.) is amended by redesignating section 124 as section 125 and by inserting immediately after section 123 the following new section:

"*Judicial Review*

"Sec. 124. (a) Notwithstanding any other provision of law, any appeal from—

"(1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act; and

"(2) any decision of the court having jurisdiction over the reorganization of the Milwaukee Railroad with respect to the constitutionality of the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.), shall be taken to the United States Court of Appeals for the Seventh Circuit.

"(b) If appeals are taken from decisions described in subsection (a) of this section involving section 106 or 110 of this title or section 9 or 15 of the Milwaukee Railroad Restructuring Act, the court of appeals shall determine such appeals in a consolidated proceeding, sitting en banc, and shall render a final decision no later than 60 days after the date the last such appeal is filed.

"(c) Nothing in this Act or in the Milwaukee Railroad Restructuring Act (45 U.S.C. 901 et seq.) shall limit the right of any

person to commence an action in the United States Court of Claims under section 1491 of title 28, United States Code (commonly referred to as the Tucker Act)."

(2) Section 110(e) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1008(e)) is amended by inserting "to employees" immediately after "liability".

(3) Section 15(e) of the Milwaukee Railroad Restructuring Act (45 U.S.C. 914(E)) is amended by inserting "to employees" immediately after "liability".

(b)(1) Section 106 of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1005) is amended to read as follows:

"*Employee Protection Agreements*

"Sec. 106. (a) No later than 5 days after the date of enactment of the Staggers Rail Act of 1980, in order to avoid disruption of rail service and undue displacement of employees, the Rock Island Railroad and labor organizations representing the employees of such railroad with the assistance of the National Mediation Board, may enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad. Such employee protection may include, but need not be limited to, employee relocation incentive compensation, moving expenses, and separation allowances.

"(b) If the Rock Island Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 5 days after the date of enactment of the Staggers Rail Act of 1980, the matter shall be immediately submitted to the Commission. The Commission shall impose upon the parties by appropriate order a fair and equitable arrangement with

respect to employee protection no later than 15 days after the date of enactment of the Staggers Rail Act of 1980, unless the Rock Island Railroad, and the authorized representatives of its employees have by then entered into a labor protection agreement. For purposes of this subsection, the term 'fair and equitable' means no less protective of the interests of employees than protection established by and pursuant to section 9 of the Milwaukee Railroad Restructuring Act (45 U.S.C. 908), subject to the limitations set forth in section 110 of this title.

"(c) If an employee protection arrangement is imposed by the Commission under subsection (b) of this section, the bankruptcy court shall immediately authorize and direct the Rock Island Railroad trustee to, and the Rock Island Railroad trustee and the labor organizations representing the employees of the railroad shall, immediately implement such arrangement.

"(d) Any order of the Commission under subsection (b) of this section and any order of the bankruptcy court under subsection (c) of this section may be appealed only to the United States Court of Appeals for the Seventh Circuit. Any such appeal to such court of appeals shall be filed within 5 days after the date of entry of the order of the Commission or the bankruptcy court, as the case may be, and such court of appeals shall finally determine such appeal within 60 days after the date such appeal is filed.

"(e)(1) Any claim of an employee for benefits and allowances under an employee protection agreement or arrangement entered into under this section shall be filed with the Board in such time and manner as the Board by regulation shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement or arrangement and shall certify such amount to the Rock Island Railroad for payment.

"(2) Benefits and allowances under such agreement or arrangement entered into this section shall be paid by the Rock

Island Railroad from its own assets or in accordance with section 110 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Rock Island Railroad.

"(f) The first sentence of section 7(b)(7) of the Railroad Retirement Act of 1974 (45 U.S.C. 231f(b)(7)) is amended by striking out "Milwaukee Railroad Restructuring Act" and inserting in lieu thereof", the Milwaukee Railroad Restructuring Act, and the Rock Island Railroad Transition and Employee Assistance Act."

(2) Section 108(a) of the Rock Island Railroad Transition and Employee Assistance Act (45 U.S.C. 1007(a)) is amended by inserting immediately before the period at the end thereof the following: "(other than as provided in the agreement entered into in Washington, District of Columbia, on March 4, 1980, entitled 'Labor Protective Agreement Between Railroads Parties Hereto Involved in Midwest Rail Restructuring and Employees of Such Railroads Represented by the Rail Labor Organizations Operating Through the Railway Labor Executives' Association')."

(3) Section 103(5) of the Rock Island Railroad Transition and Employees Assistance Act (45 U.S.C. 1002(5)) is amended by inserting immediately before the period at the end thereof the following: "the estate of such Company in its reorganization proceeding, or the trustee appointed in such proceeding".

* * *

JOINT EXPLANATORY STATEMENT OF THE CONFERENCE COMMITTEE

Section 701—Rock Island and Milwaukee Railroads [A]mendments

Senate bill. No provision.

House amendment. The House amends the Rock Island Transition and Employee Assistance Act and the Milwaukee Railroad Restructuring Act in several instances. The Amendment provides that any decision with respect to constitutionality of the Rock Island Transition Act or the Milwaukee Railroad Restructuring Act from the respective courts having jurisdiction over the respective railroads in bankruptcy shall be taken to the United States Court of Appeals for the Seventh Circuit. If a constitutional challenge is made to the procedure under this provision, the challenge shall be heard by the United States Court of Appeals for the Seventh Circuit because the procedure is part of the Rock Island Transition Act. Should the appeals on constitutionality involve section 106 or section 110 of the Rock Island Transition Act or sections 9 or 15 of the Milwaukee Railroad Restructuring Act, regarding the claim of administration for employee protection claims, the court shall determine the appeals in a consolidated proceeding and render a final decision no later than 60 days after the last such appeal is filed.

The House amendment clarifies the Rock Island Transition and Milwaukee Railroad Restructuring Act to state affirmatively that nothing in these acts shall limit the right of any person to bring an action under the Tucker Act. This provision was not in the original Acts on the grounds that there continued to exist a Tucker Act remedy where Congress has not explicitly waived such a remedy. See Regional Rail Reorganization Cases, 419 U.S. 102, 125 (1974). However, in reviewing Judge [Mc]Garr's injunction of the Rock Island Transition Act, Justice Stevens

expressed concern about the availability of such a remedy where [*sic*] the injunction to be lifted and were the Act subsequently to be held unconstitutional, _____ U.S. _____ (1980). This specific provision clearly establishes that the Tucker Act is available and nothing in these Acts limits the right of any person to seek redress under the Tucker Act.

The House amendment provides for a new schedule for the negotiation of an employee protection agreement between the Rock Island Railroad and the Labor organizations. If these parties are not able to come to an agreement within 5 days, the Commission is to impose a fair and equitable arrangement no less protective of the interests of employees than the protection established under section 9 of the Milwaukee Railroad Restructuring Act within 15 days after the enactment of the Staggers Rail Act. The bankruptcy court shall order the Rock Island Trustee and the Rock Island employee organizations to implement such arrangement immediately. Any order of the Commission or the bankruptcy court with respect to implementing such order shall be appealed only to the United States Court of Appeals for the Seventh Circuit within 5 days after the order of the Commission or the bankruptcy court, whichever is later, and shall be determined within 60 days after the appeal is filed. Benefits and allowances under this arrangement shall be paid by the Rock Island Railroad and shall be treated as administrative expenses of the estate of the Rock Island Railroad. By specifically stating that there is a Tucker Act remedy, the benefits and allowances will immediately become available to the qualifying Rock Island employees and the Trustee may pursue his allegations of unconstitutional action under the Tucker Act.

Under Section 7(d), (e), and (f) of the Milwaukee Railroad Restructuring Act, certain obligations to the United States were subordinated to the creditors, but not the stockholders. Hence, there is a gap between these two classes of interests. The House

amendment eliminates this gap, by forgiving such subordinated obligations to the United States when the Milwaukee Railroad is either successfully reorganized as a rail carrier or when more than 50% of the railroad as it exists on the effective date of the Staggers Rail Act is purchased and 50% of its employees on that date have obtained employment with other carriers. By eliminating this gap in this way, the House amendment will encourage the Milwaukee Railroad's stockholders to seek a successful reorganization or purchase and not feel it necessary to seek liquidation at this time.

Additional funds for Transaction Assistance under the Rock Island Transition Act for the purchase of abandoned lines by non-rail carrier entities of the Rock Island Railroad and Milwaukee Railroad and for rail banking of lines of the Milwaukee Railroad in Montana are made available. The Secretary may determine if applications for purchase filed after September 15, 1980, are appropriate. Other than the funds specifically reserved for Montana[,] Transition assistance funds should be equitably distributed without State preference to non-carrier entities which have applied for funds.

Conference substitute. The Conference substitute adopts the House provision, with minor modifications and deletion of the new findings for the Rock Island Transition Act. The conferees believe that there is an obligation upon the Rock Island estate to provide employee protection as a claim of administration to its employees who were not covered by the March 4, 1980, agreement. Further, the conferees believe the Rock Island estate has benefitted from the Rock Island Transition Act by the reduction in its employee protection liability and through the Congressionally supported March 4, 1980, agreement, the ability to lease its facilities and the use of funds to purchase its facilities, thus preserving its value as a going concern, and the expeditious consideration of Rock Island transactions at the Commission. The

conferees reiterate that it is the intention of Congress that employee protection be imposed in bankruptcy proceedings involving major rail carriers, for to do otherwise would be to promote liquidations, to the detriment of the employees and the public interest.

Supreme Court, U. S.
FILED
DEC 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; the FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; and HENRY CROWN, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; the UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Respondents.*

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Seventh Circuit

---

BRIEF FOR RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION

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December 17, 1980

QUESTION PRESENTED

In the opinion of respondent Railway Labor Executives' Association, the question framed by petitioners does not accurately state the issue raised by their petition; in respondent's opinion, the following question is presented:

> Should this Court accept for review prior to judgment by the United States Court of Appeals for the Seventh Circuit (which judgment must be rendered by December 28, 1980), an order enjoining, preliminarily, enforcement of the employee protective features of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980, and thereby frustrate the clearly expressed intent of Congress that the constitutionality of those statuory provisions be decided by a neutral court as expeditiously as possible?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-704

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island & Pacific Railroad Company; the FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee; and HENRY CROWN, *et al.*,
Petitioners,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; the UNITED STATES OF AMERICA; the INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Respondents.*

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Seventh Circuit

BRIEF FOR RESPONDENT RAILWAY LABOR EXECUTIVES' ASSOCIATION IN OPPOSITION

Respondent Railway Labor Executives' Association [hereinafter, "RLEA"] respectfully submits that this Court should deny petitioners Gibbons', *et al.*, request for the

issuance of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in order to review prior to a decision by that Court a preliminary injunction issued on October 16, 1980, enjoining enforcement of the employee protective features of the Rock Island Transition and Employee Assistance Act, as amended by the Staggers Rail Act of 1980 [hereinafter, "RITA" and "SRA," respectively], Pub.L. No. 96-254, amended by Pub.L. No. 96-448, 45 U.S.C. § 1001, *et seq.* Congress has provided through Section 124 of RITA, as amended, that the Seventh Circuit issue its decision by December 28, 1980, in the appeals taken from the injunction issued on October 16, 1980, and a granting of petitioners' request for an interlocutory writ of certiorari would frustrate that intent of Congress.

JURISDICTION

Respondent RLEA disagrees with petitioners' assertion that because of 28 U.S.C. § 1252, this Court has the jurisdiction to review initially the order issued on October 16, 1980. Respondent respectfully submits that whatever jurisdiction this Court may have in this matter is derived from 28 U.S.C. § 1254(1) alone.

COUNTERSTATEMENT OF THE CASE

Rather than reiterate what has been stated before, respondent RLEA adopts as its main statement of the case both its statement at Pages 3 to 8 in the Jurisdictional Statement which it filed on September 15, 1980, in No. 80-415, and the statement of the case set forth at Pages 5 and 6 of the Brief in Opposition to the instant petition for a writ of certiorari which was lodged with this Court by the Trustee of the Chicago, Milwaukee, St. Paul & Pacific Railroad Company [hereinafter, "MILW"]. However, respondent RLEA believes that certain additional facts must be noted. Moreover, certain events have occurred since the

MILW Trustee's brief was lodged which bear upon the efficacy of petitioners' request herein, and those events should also be noted.

Petitioners continually refer to the order of the reorganization court of the Chicago, Rock Island & Pacific Railroad Company [hereinafter, "CRI" or "Rock Island"], dated October 15, 1980 (that is, the order they ask this Court to affirm), as being a denial of motions to vacate the June 9, 1980, preliminary injunction. However, as the very heading of the October 15, 1980, order shows, it is in reality an injunction, preliminarily enjoining enforcement of Sections 106 and 110 of RITA, as amended by the SRA.

Within hours after that injunction was issued on October 16, 1980, respondent RLEA filed a notice of appeal to the Seventh Circuit pursuant to Section 124(a) of RITA, as added by the SRA (docketed as No. 80-2487), and on October 29, 1980, the United States also filed a notice of appeal from that order to the Seventh Circuit pursuant to Section 124(a) (docketed as No. 80-2536).

Respondent RLEA and the federal respondents filed their briefs in their appeals from that injunction by the end of October 1980, and on November 10, 1980, petitioners filed their brief in opposition. RLEA filed a reply brief on November 12, 1980, and on November 13, 1980, the Seventh Circuit sitting *en banc* heard oral arguments on those appeals. The cases have been submitted and are awaiting a ruling by the Seventh Circuit which, according to Section 124(b) of RITA, as added by the SRA, must be rendered by December 28, 1980. Moreover, RLEA filed with the Seventh Circuit a motion to stay that injunction, and that motion is still pending. Consequently, if this Court accepts review of the preliminary injunction prior to that decision, it is inevitable that a decision will not be rendered by this Court for several months on what are now submitted appeals.

REASONS FOR DENYING THE WRIT

1. While This Case Does Present A Matter Of Grave Public Importance, The Public Interest In A Speedy Determination Of The Issue Would Be Frustrated By A Granting Of The Requested Writ At This Time

Petitioners recognize that a writ of certiorari to review a case pending in a federal court of appeals before judgment, while permitted by 28 U.S.C. § 1254(1), will not be granted unless petitioners show "that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." Rule 18, Rules of this Court. According to petitioners, however, this case presents one of those rare instances where the grave public importance of the constitutional issues presented, together with the pending appeal by RLEA in *RLEA* v. *Gibbons*, Sup. Ct. No. 80-415, warrant the immediate issuance of a writ of certiorari to place before this Court the appeals presently awaiting decision before the Seventh Circuit. While respondent RLEA agrees with petitioners that the appeals from the October 15, 1980, preliminary injunction do present matters of grave public importance, respondent nevertheless submits that a pre-judgment writ of certiorari should not be issued in this case, for to do so would frustrate once again the clear intent of Congress that this matter be preliminarily reviewed as quickly as possible.

When Congress passed Section 701 of the SRA amending RITA, it was well aware that it was probable that the Rock Island creditors would once again challenge enforcement of the employee protective features of RITA. Since Congress believed that it was essential to the public interest that the employee protective features of that Act be implemented as soon as possible (*e.g.*, H.Rpt. No. 96-1041, 96th Cong., 2d Sess. at 26(1980)), it expressly provided that "any appeal from . . . any decision of the [CRI reorganization] . . . court with respect to the constitutionality

of any provision of [RITA] . . . shall be taken to the United States Court of Appeals for the Seventh Circuit" (§ 124(a)(1) of RITA, as added by § 701(a)(1) of SRA), and that in cases such as the ones at bar, the Seventh Circuit "shall render a final decision no later than 60 days after the date the last such appeal is filed." Section 124(b) of RITA, as added by Section 701(a)(1) of SRA. Those provisions clearly indicate that Congress intended that an appellate court expeditiously and quickly review an injunction enjoining enforcement of Sections 106 and 110 of RITA, as amended.

At the present time, the appeals from the October 15, 1980, order have been briefed, argued, and submitted, and the Seventh Circuit has taken those appeals under advisement with a clear understanding that a decision must be rendered by December 28, 1980. Consequently, it is apparent that if this Court accepts petitioners' request for the issuance of a pre-judgment writ of certiorari, a neutral court will not pass on the merits of RLEA's and the government's appeals until long after the sixty (60) day time period specified in the Act has passed. Respondent RLEA respectfully submits that such a clear frustration of the will of Congress should not be permitted to occur.

Rule 18 of the Rules of this Court indicates that a prejudgment writ of certiorari should issue only in those cases where the grave public importance of the case requires this Court to determine the question with as much dispatch as possible. *See, R.L. Stern and E. Gressman,* Supreme Court Practice at 304 (5th Ed. 1978). Here, in light of the present posture of the appeals pending before the Seventh Circuit, and in view of the mandatory requirements of Section 124(b) of RITA, the issuance of a prejudgment writ of certiorari in these cases will only serve to delay further a preliminary resolution of the validity of the statutory provisions intended to provide needed benefits to employees—benefits which Congress has twice man-

dated be paid immediately while the validity of the Act is elsewhere determined. *E.g.*, Pet. at j-6, H.Rpt. No. 96-1430, 96th Cong., 2d Sess. at 138 (1980).

2. Petitioners Cannot Rely Upon 28 U.S.C. § 1252 To Support Their Request For The Issuance Of A Pre-judgment Writ Of Certiorari

Petitioners assert that since respondent RLEA has previously taken an appeal to this Court pursuant to 28 U.S.C. § 1252 from the June 9, 1980, preliminary injunction, its appeal from the order of the CRI Reorganization Court dated October 15, 1980, as modified on October 16, 1980, should have also been taken to this Court, and not to the Seventh Circuit. Petitioners then go on to argue that because respondent RLEA has taken its appeal to the wrong court, this Court should rectify that error at this time by issuing a pre-judgment writ of certiorari. Respondent RLEA respectfully submits that petitioners' reliance upon 28 U.S.C. § 1252 to support its request for the issuance of a writ of certiorari is misplaced for several reasons. First, any asserted error in jurisdiction can be, and indeed has been raised by petitioners in the Court of Appeals, and is reviewable by this Court *after* the appeals court has ruled upon that contention. Second, petitioners' argument that 28 U.S.C. § 1252 governs RLEA's appeal from the order of October 15, 1980, is without merit.

Were it not for Section 124(a) of RITA, as added by the SRA, respondent RLEA would have agreed with petitioners and would have taken its appeal from the October 15, 1980, order to this Court. However, Section 124(a) of RITA expressly provides that:

> *Notwithstanding* any other provision of law, any appeal from—
>
> (1) any decision of the bankruptcy court with respect to the constitutionality of any provision of this Act
>
> . . .

> ***shall be taken*** **to the United States Court of Appeals for the Seventh Circuit.**

(Emphasis added.) Respondent RLEA respectfully submits that this specific statutory provision governed RLEA's October appeal, and to the extent that 28 U.S.S. § 1252 is inconsistent, Section 124(a) superseded that statute and was controlling.

RLEA's appeal to this Court from the June 9th injunction was governed by 28 U.S.C. § 1252 which, as petitioners correctly note, provides that "any subsequent appeal or cross appeal [shall be taken] to the Supreme Court." Since the October 15th Order, whether it be considered a new injunction or a reaffirmance of a prior order modified to fit new circumstances, is a subsequent order in a case presently pending before this Court under 28 U.S.C. § 1252, it ordinarily would have been appealable only to this Court. Petitioners hinge their argument in support of their request for a pre-judgment writ upon that subsequent appeal provision, and assert that Section 124(a) is inapplicable for two reasons. First, according to petitioners, Section 124(a) must be construed as being prospective in application,[1] and second, that provision cannot be construed as depriving this Court of jurisdiction over a pending case and still be constitutional.[2] Petitioners' arguments, however, are without merit, for what petitioners gloss over is the fact that the order dated October 15, 1980, is appealable in its own right, and the jurisdiction of any court to hear that appeal

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[1] That argument is contrary to the rules of statutory construction for the general rule is that statutes affecting jurisdiction apply to pending suits, and jurisdiction will not survive unless expressly reserved. *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953).

[2] That argument questions the continued validity of *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), but ignores the fact that Section 124(a) does not deprive this Court of jurisdiction to review this case, or the earlier appeal by way of a writ of certiorari. *See, Ex Parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

could not have vested until after the order was issued and RLEA noted its appeal, two days after the SRA, with its amendments to RITA, was enacted. Jurisdiction, RLEA respectfully submits, does not exist in a vacuum.

Section 124(a) of RITA, a specific statute, expressly provided at the time the October 15th order was issued that, "*Notwithstanding* any other provision of law," any appeal from that order should be brought to the Seventh Circuit. By the unequivocal terms of that statute, it superseded the subsequent appeal provision of Section 1252, and under normal rules of statutory construction would control over a more general statute such as Section 1252. *E.g., Posadas* v. *National City Bank,* 296 U.S. 497, 503-04 (1936); *see also, Radzanower* v. *Touche Ross & Co.,* 426 U.S. 148 (1976).

While respondent RLEA recognizes that implied repeals are not favored, *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 133-34 (1974), they have occurred. Moreover, it must also be recognized that rules of statutory construction are simply yardsticks by which to measure congressional intent. In this case, the Conference Report of the SRA, H. Rpt. No. 96-1430, *supra,* at 137-38 (1980), clearly indicates that Congress intended Section 124(a) to require constitutional challenges such as the ones arising from RLEA's and the Government's appeals from the October 15th order, to be heard by the Seventh Circuit. However, it is impossible to give effect to both Sections 1252 and 124(a) in this matter; one statute has to govern because only one court can hear this matter initially. Since the subsequent appeal provisions of Section 1252, and Section 124(a) cannot both coexist as applied to this case, the Congressional intent in enacting Section 124(a), a specific statute, should be controlling. *See, Morton* v. *Mancari,* 417 U.S. 535, 550-51 (1974); *Posadas* v. *National City Bank, supra.* Congress' use of the phrase "Notwithstanding any other provision of law" clearly indicates that Congress intended Section 124(a), and not Section 1252, to be controlling.

Another problem with petitioners' reliance upon 28 U.S.C. § 1252 to avoid the force of Section 124(a) of RITA, is that the enactment of the SRA amendments to Sections 106 and 110 of RITA has rendered moot RLEA's appeal in No. 80-415 from the injunctive order of June 9, 1980. It is well settled that a reviewing court must examine an injunction in light of the law as it stands when that injunction is reviewed; not as it stood when the injunction was issued. *Diffenderfer* v. *Central Baptist Church*, 404 U.S. 412, 414 (1972); *Bryan* v. *Austin*, 354 U.S. 933 (1957). Where that amended law materially affects the rationale for the issuance of the injunction in the first place, it can nullify the justiciability of an appeal. *E.g., Hall* v. *Beals*, 396 U.S. 45, 48 (1969). Stated differently, where the subsequent law is itself the new source of the dispute between the parties, a decision on the prior law will not affect the rights of the parties, and thus, an appeal from an injunction under the prior law is moot. *E.g., United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 115-17 (1920).

This is precisely the situation in the matter before this Court in No. 80-415 (RLEA's appeal from the June 9th injunction), for the order dated October 15, 1980, is the reason why Sections 106 and 110 of RITA, as amended, are not being enforced; not the June 9th order. The statutory provisions which are the subject of the June 9, 1980 injunction have been repealed and replaced by new provisions which materially modify the prior requirements upon which the earlier injunction was premised. Consequently, that appeal is moot, and cannot be used by petitioners as a bootstrap to deprive the Seventh Circuit of jurisdiction by virtue of an improvident application of 28 U.S.C. § 1252. *Cf., United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966).

CONCLUSION

For the reasons set forth herein, and for those reasons set forth in the brief of the Milwaukee Railroad Trustee which was lodged with this Court on or about November 7, 1980, respondent RLEA submits that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, TRUSTEE, ETC., ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-704

WILLIAM M. GIBBONS, TRUSTEE, ETC., ET AL.,
PETITIONERS

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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1. Petitioners seek a writ of certiorari before judgment to review an injunction (Pet. App. b-1 to b-4) entered by the United States District Court for the Northern District of Illinois on October 15, 1980, which prohibits the Interstate Commerce Commission, the Secretary of Transportation and the Trustee of the Rock Island Railroad from fulfilling their obligations under Sections 106 and 110 of the Rock Island Railroad Transition and Employee Assistance Act ("Rock Island Act"), Pub. L. No. 96-254, 94 Stat. 401 and 403, as amended by the Staggers Rail Act of 1980, Pub. L.

No. 96-448 (Oct. 14, 1980).[1] Oral argument was held on November 13, 1980, before the Seventh Circuit, sitting en banc, on an appeal of this injunction taken under Section 124(a) of the Rock Island Act, as amended by the Staggers Rail Act (see Pet. App. j-l). A decision on that appeal is due by December 28, 1980 (Section 124(b), Pet. App. j-l).

The October 15 injunction (Pet. App. b-1 to b-4) was entered after a motion had been filed to vacate, in light of the passage of the Staggers Rail Act, an injunction entered by the district court on June 9, 1980 (Pet. App. d-1 to d-2), against the enforcement of Sections 106 and 110 of the Rock Island Act as originally enacted. The background of these proceedings is set forth in detail in the government's response to the jurisdictional statement in *Railway Labor Executives' Association* v. *William M. Gibbons, Trustee, et al.*, No. 80-415, at 1-9, which involves a direct appeal of the June 9 injunction.

2. Petitioners contend (Pet. 8-12) that the court of appeals lacks jurisdiction over an appeal of the October 15 injunction because of the principles of pendent jurisdiction. Since a direct appeal of the June 9 injunction has been taken to this Court, petitioners argue, the October 15 injunction is reviewable only in this Court under 28 U.S.C. 1252 because it is related to the first injunction. This contention is insubstantial.

First, the October 15 injunction does not present issues subsidiary to those presented in the appeal pending in this Court, No. 80-415, so as to make pendent jurisdiction appropriate. The second injunction presents a completely different question concerning the constitutionality of a new

---

[1]Sections 106 and 110 of the Rock Island Act, as originally enacted, are set forth in Appendix I of the petition, i-1 to i-4. Section 701 of the Staggers Rail Act, which amends the Rock Island Act, is set forth in Appendix J to the petition, j-1 to j-4.

statute that was enacted specifically to eliminate the constitutional questions that had been raised concerning the original Rock Island Act and that formed the basis for the June 9 injunction. Indeed, as explained in the government's brief in No. 80-415 (at pages 9-13), we believe that the appeal pending in this Court presents only the academic question of the constitutionality of a statute that no longer exists and thus that the June 9 injunction should be vacated as moot in light of the passage of the Staggers Rail Act. Therefore, the pending appeal in No. 80-415 provides no basis for pendent jurisdiction over an appeal from the October 15 injunction.[2]

Moreover, petitioners' pendent jurisdiction theory rests on the congressional intent embodied in 28 U.S.C. 1252 that, once a direct appeal to the Supreme Court has been taken under that Section, all subsequent appeals in the same case should be taken to this Court. However, Section 1252 has been superseded in this case by Section 124(a) of the Staggers Rail Act, which provides that "[n]otwithstanding any other provision of law," an appeal of a decision declaring any provision of the Rock Island Act unconstitutional shall be taken to the Seventh Circuit. Because the October 15 injunction is a decision that falls within the ambit of Section 124(a), it is clear that Congress intended that it be reviewed in the Seventh Circuit, irrespective of the general rule of Section 1252.

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[2]Even if the October 15, 1980, decision is viewed as simply continuing the earlier injunction in force—a view we consider to be untenable—petitioners err in suggesting (Pet. 11) that the Staggers Rail Act cannot be read as divesting this Court of jurisdiction over a pending case. In fact, the general rule is that when Congress divests a court of jurisdiction over a particular class of cases, pending cases are also included unless the statute expressly preserves jurisdiction over them. See *De La Rama Steamship Co.* v. *United States*, 344 U.S. 386, 390 (1953); *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952). None of the cases cited by petitioner stands for a contrary proposition where, as here, ultimate recourse may be had to this Court.

In any event, even if petitioners were correct in asserting that an appeal of the October 15 injunction may only be taken to this Court, it would not justify the relief requested. If the court of appeals is without jurisdiction to decide the appeal, this Court would likewise lack jurisdiction to decide the appeal following the grant of a writ of certiorari. See, *e.g.*, *Liberty Mutual Ins. Co.* v. *Wetzel*, 424 U.S. 737 (1976). Only cases properly "in" the court of appeals may be brought to this Court by writ of certiorari before judgment.[3] See R. Stern & E. Gressman, *Supreme Court Practice* 54-55 (5th ed. 1978):

> But it is also necessary that the appeal, even though docketed in the court of appeals, be properly "in" that court at the time when the petition for certiorari before judgment is filed. A case is properly "in" the court of appeals if the judgment of the district court is an appealable order or otherwise falls within the jurisdiction of the courts of appeals. *United States* v. *Nixon*, 418 U.S. 683, 690-692. Put differently, what the Supreme Court is asked to do by way of granting certiorari before judgment is to render the kind of judgment on the merits of the appeal that the court of appeals could have rendered. If there be a jurisdictional defect that would preclude the court of appeals from reaching the merits of the appeal, that defect likewise prevents the Supreme Court from resolving the merits upon the grant of certiorari before judgment.

3. Assuming that the Seventh Circuit does have jurisdiction, petitioners seek (Pet. 12-16) a writ of certiorari

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[3]Petitioners' appropriate course, if their jurisdictional argument had merit, would be to move to dismiss the appeal to the Seventh Circuit for lack of jurisdiction. Petitioners in fact made such a motion on October 25, 1980. That motion is now pending before the court of appeals.

before judgment in the interest of "efficient allocation of judicial resources" (*id.* at 16). This request is without merit.

Congress specifically established a procedure for expedited review of constitutional questions under the Rock Island Act (see Sections 106(d) and 124, Pet. App. j-1, j-3), and there is no reason to interfere with that procedure. The Seventh Circuit's decision is reviewable in this Court; thus, no possible danger of inconsistent adjudications is presented. Moreover, the court of appeals has already heard argument on the merits of the appeal, and it must render its decision by December 28, 1980. Allowing the court of appeals to complete its consideration not only gives effect to the manifest intent of Congress, but also is consistent with principles of judicial economy and the sound administration of justice.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

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Interstate Commerce Commission

DECEMBER 1980

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No. 80-704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM M. GIBBONS, Trustee of the Chicago, Rock Island and Pacific Railroad Company, Debtor; THE FIRST NATIONAL BANK OF CHICAGO, as Indenture Trustee; CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, as Indenture Trustee, and HENRY CROWN, et al., *Appellees-Petitioners,*

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION; THE UNITED STATES OF AMERICA; THE INTERSTATE COMMERCE COMMISSION; and NEIL GOLDSCHMIDT, United States Secretary of Transportation, *Appellants-Respondents.*

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION TO INTERVENE AS RESPONDENT OR, ALTERNATIVELY, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

BRIEF FOR INTERVENOR-RESPONDENT/AMICUS CURIAE, RICHARD B. OGILVIE, TRUSTEE OF THE PROPERTY OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY IN OPPOSITION

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MOTION TO INTERVENE AS RESPONDENT OR, ALTERNATIVELY, FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN OPPOSITION

Richard B. Ogilvie, Trustee ("Milwaukee Road Trustee") of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company ("Milwaukee Road"), hereby respectfully moves to intervene in this case as a respondent and attaches hereto his brief for intervenor-respondent in opposition for filing in this case, in the event this motion is granted.

The Milwaukee Road Trustee hereby also respectfully moves, alternatively, for leave to file the attached brief as amicus curiae in opposition in this case, in the event his motion to intervene is denied. The consent of

the Attorneys for the respondents for the filing of a brief amicus curiae has been requested and such consents will be filed, if obtained. The consent of the Attorneys for the petitioners was requested but refused.

The Milwaukee Road Trustee's interest in opposing the Petition is based on the fact that he is a party to an appeal presently pending in the Court of Appeals for the Seventh Circuit (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 80-1364; "Milwaukee Road Appeal") in which the same issues as to which the Petition seeks review before this Court have been raised. Those issues are (1) whether legislation imposing obligations for the financial protection of displaced employees of an insolvent employer constitute an uncompensated "taking" in violation of the Fifth Amendment to the United States Constitution and (2) whether Congress has authority under the Bankruptcy Clause to enact particularized legislation of that nature addressed to the specific problems facing less than all insolvent railroads and their employees. At the same time, Petitioners, themselves, are parties to another appeal, also presently pending before the Court of Appeals for the Seventh Circuit (*In re Chicago, Rock Island, and Pacific Railroad Co.*, No. 80-2487; "Rock Island Seventh Circuit Appeal") that involves exactly the same issues and parties as those the Petition seeks to bring before the Court in this matter. The Milwaukee Road Trustee has been granted leave to appear in the Rock Island Seventh Circuit Appeal as Amicus Curiae and to file his principal brief in the Milwaukee Road Appeal as a brief amicus curiae in the Rock Island Seventh Circuit Appeal.

The Court of Appeals for the Seventh Circuit has set the briefing schedules and the date for oral argument

in both the Milwaukee Road and Rock Island Seventh Circuit Appeals to coincide. It took such action pursuant to Title VII, Section 701(a)(1) of the Railroad Transportation Policy Act of 1980, Pub. L. No. 96-448 ("Staggers Act"), which establishes primary appellate jurisdiction over both appeals in the Court of Appeals for the Seventh Circuit and requires that they be determined "in a consolidated proceeding".

That statutory procedure for the consolidated review in the two appeals reduces the practical burdens on the several parties participating in both appeals, including the Milwaukee Road Trustee (as appellee in the Milwaukee Road Appeal and as amicus curiae in the Rock Island Seventh Circuit Appeal) and the Railway Labor Executives' Association, the Interstate Commerce Commission and the United States Secretary of Transportation (all as appellees in the Milwaukee Road Appeal and as appellants in the Rock Island Seventh Circuit Appeal) by enabling them to consolidate their efforts in preparing briefs and for oral argument in both appeals. The Petition, if granted, would deny those parties the benefits of that statutory procedure, by separating the two appeals involving virtually identical issues of constitutional law for simultaneous review in two different courts at two different levels of the federal judicial system.

It is in order to protect his legal and practical interest in a consolidated proceeding, as provided for under the Staggers Act, that the Milwaukee Road Trustee seeks to intervene in this matter as a respondent or, alternatively, leave to file a brief amicus curiae. In further support of his motion to intervene for the first time before this Court, the Milwaukee Road Trustee points out that the jurisdictional issues affecting his interest in that statutory consolidation procedure have

been raised for the first time by the Petition and by a complementary motion to dismiss or certify the question, filed with the Court of Appeals only five days earlier than the filing of the Petition with this Court. (Counsel for the Milwaukee Road Trustee first learned of both that motion to dimiss or certify the question and the Petition herein on the same day.) Accordingly, there was no reason for the Milwaukee Road Trustee to seek earlier intervention as a party in interest to the Rock Island controversy in either the District Court or the Court of Appeals.

In further support of his alternative motion for leave to file a brief amicus curiae, the Milwaukee Road Trustee points out that, because the jurisdictional issues affecting his procedural rights have not previously been joined in this case, in either the District Court or the Court of Appeals, he is without sufficient information to judge whether respondents are likely to pursue a course of argument that will adequately address those issues.

Respectfully submitted,

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Dated: November 7, 1980

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QUESTION PRESENTED

The Milwaukee Road Trustee disagrees with the Petition's Statement of the Question Presented. The Questions Presented are whether:

(1) Title VII, Section 701 (a)(1) of the Staggers Act effectively removes this entire controversy, including the appeal that was pending prior to enactment of that legislation, from the jurisdiction of this Court, *first* by repealing the Court's former direct appellate jurisdiction over the controversy under 28 U.S.C. §1252 and *second* by rendering moot the related appeal already pending before the Court, upon which jurisdiction over the review sought by the Petition must rest, if at all.

(2) Whether the Court should grant the Petition, as a matter of discretion under 28 U.S.C. §1254(1) and §2101(e), where there is no sound basis in policy for such action.

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INTEREST OF THE INTERVENOR-RESPONDENT/AMICUS

Richard B. Ogilvie ("Milwaukee Road Trustee") is the duly appointed trustee of the property of the Chicago, Milwaukee, St. Paul and Pacific Railroad

[1] This Brief is submitted for filing as the Milwaukee Road Trustee's Brief in Opposition, in his capacity as Intervenor-Respondent, in the event his accompanying Motion To Intervene is granted, or in his capacity as Amicus Curiae, in the event his alternative Motion for Leave to File Brief Amicus Curiae is granted.

Company ("Milwaukee Road"), which, like the Chicago, Rock Island and Pacific Railroad Company ("Rock Island"), is currently undergoing reorganization, pursuant to Section 77 of the Bankruptcy Act of 1938, 11 U.S.C. §205 (1976), in a proceeding pending in the United States District Court for the Northern District of Illinois (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 77 B 8999). *See In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 611 F.2d 662 (7th Cir. 1979).

The Milwaukee Road Trustee's interest in opposing the Petition is based on the fact that he is a party to a pending appeal before the Court of Appeals for the Seventh Circuit (*In re Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, No. 80-1346; "Milwaukee Road Appeal") that involves substantially the same constitutional issues as to which the Petition seeks initial review by this Court.[2] At the same time, Petitioners,

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[2] *See* February 7, 1980 Order (No. 286) and attached Decision in the Milwaukee Road reorganization proceeding, which appears at Appendix ("MRT App.") A, pp. a-1, *et seq. infra* and Notice of Appeal therefrom, which appears at MRT App. B, p. b-1 *infra*. *Compare* the following record from the Rock Island reorganization proceeding, which appears in the Appendix to the Petition ("Pet. App."): October 15, 1980 Order (Pet. App. B, pp. b-1, *et seq.*); Excerpts from transcript of Proceedings, October 7, 1980 (Pet. App. B, pp. b-1, *et seq.*); June 9, 1980 Preliminary Injunction (Pet. App. D, pp. d-1, *et seq.*); Excerpts from the transcript of Proceedings, June 9, 1980 (Pet. App. C, pp. c-1, *et seq.*); Excerpts from Record of Proceedings, June 20, 1980 (Pet. App. E, pp. e-1, *et seq.*)

Sections 9, 13 and 15 of the Milwaukee Road Restructuring Act, Pub. L. No. 96-101, 45 U.S.C.A. §§908, 912, 914 (Supp. 1980) ("Milwaukee Road Act"), the constitutionality of which is at issue in the Milwaukee Road Appeal appear at MRT App. C, pp. c-1, *et seq. infra*. They provide for a program of employee protection benefits that is substantially identical to the program set forth in Sections 106 and 110 of the Rock Island Railroad Transition and

themselves, are parties to another appeal, also presently pending before the Court of Appeals for the Seventh Circuit (*In re Chicago, Rock Island and Pacific Railroad Co.*, No. 80-2487; "Rock Island Seventh Circuit Appeal"), that involves exactly the same parties and issues as those the Petition seeks to bring before the Court in this matter. Pet. at 3, 17. The Milwaukee Road Trustee has been granted leave to appear in the Rock Island Seventh Circuit Appeal as amicus curiae[3] and to file his principal brief in the Milwaukee Road Appeal as his brief amicus curiae in the Rock Island Seventh Circuit Appeal.[4]

The Court of Appeals for the Seventh Circuit has set the briefing schedules and the date for oral argument in both the Milwaukee Road and Rock Island Seventh Circuit Appeals to coincide. The Court of Appeals took such action pursuant to of Title VII, Section 701(a)(1) of the Staggers Act (Pet. App. J, pp. j-1, *et seq.*), which replaces former Section 124(a) and (b) of the Rock Island Act with provisions that establish primary appellate jurisdiction over both appeals in the Court of

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Employee Assistance Act, Pub. L. No. 96-254, 45 U.S.C.A. §§1005, 1008 (Supp. 1980) ("Rock Island Act") (Pet. App. I, pp. i-1, *et seq.*.), as amended by Title VII, Section 701 of the Railroad Transportation Policy Act of 1980, Pub. L. No. 96-448, H. R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), *reprinted in* 126 Cong. Rec. H. 9911-12 (daily ed. sept. 29, 1980) ("Staggers Act") (Pet. App. J, pp. j-1, *et seq.*). It is the constitutionality of Sections 106 and 110 of the Rock Island Act, as amended, that would be at issue in the review sought by the Petition and that is already at issue in the Rock Island Seventh Circuit Appeal. Pet. at 4-8.

[3] *See* Order dated November 3, 1980, which appears at MRT App. D, p. d-1 *infra*.

[4] *See* Order dated November 3, 1980, which appears at MRT App. 3, p. e-1 *infra*.

Appeals for the Seventh Circuit and requires that they be determined "in a consolidated proceeding."[1]

That statutory procedure for the consolidated review in the two appeals reduces the practical burdens on the several parties participating in both appeals, including the Milwaukee Road Trustee (as an appellee in the Milwaukee Road Appeal and as amicus curiae in the Rock Island Seventh Circuit Appeal) and the Railway Labor Executives' Association, the Interstate Commerce Commission and the United States Secretary of Transportation (all as appellees in the Milwaukee Road Appeal and as appellants in the Rock Island Seventh Circuit Appeal) by enabling them to consolidate their efforts in preparing briefs and for oral argument in both appeals. The Petition, if granted, would deny those parties the benefits of that statutory procedure, by separating the two appeals involving virtually identical issues of constitutional law for simultaneous review in two different courts at two different levels of the federal judicial system. It is in order to protect his legal and practical interest in a consolidated proceeding, as provided for under the Staggers Act, that the Milwaukee Road Trustee has sought to intervene in this matter as a respondent or, in the alternative, for leave to file a brief amicus curiae in opposition.

---

[1] Although the Court of Appeals denied a motion by the Milwaukee Road Trustee to formally consolidate the Milwaukee Road and Rock Island Seventh Circuit Appeals (erroneously the Milwaukee road Trustee believes), the procedures established effect the same practical result.

JURISDICTION

The Court does not have jurisdiction under 28 U.S.C. §1252 to grant the Petition because Title VII, Section 701 (a)(1) of the Staggers Act removes the applicability of 28 U.S.C. §1252 to this entire controversy as discussed more fully in Part I of the Argument.

STATEMENT OF THE CASE

The Statement of the Case set forth in the Petition inappropriately characterizes (Pet. at 7) Judge McGarr's Order of October 15, 1980, for which the Petition seeks review, as having "concern[ed] the *same statute* and the *same injunction*" (emphasis in the original) as to which the previously pending appeal before this Court[6] (from Judge McGarr's Order of June 9, 1980) is related. To the contrary, Sections 106 and 110 of the Rock Island Act had been amended and supplemented by Title VII, Section 701(a)(1) of the Staggers Act between the time of the June 9, 1980 Order and the time of the October 15, 1980 Order, in a specific attempt to cure the constitutional deficiencies suggested by the June 9, 1980 Order. *See* H.R. Rep. No. 1430, 96th Cong., 2d Sess. (1980), *reprinted in* 126 Cong. Rec. H9931 (daily ed. Sept. 29, 1980). Accordingly, as discussed in Part IB of the Argument, a *new statute* was involved in the October 15, 1980 Order and the Order, therefore, had the effect of establishing a *new injunction.*

The statement (Pet. at 8) that "[a]n appeal in this matter . . . is pending before this Court . . ." is correct as far as it goes. It fails to recognize further, however,

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[6] *Railway Labor Executives' Association* v. *Gibbons,* No. 80-8415 (the "Pending Appeal").

that the amendments to the Rock Island Act in Title VII, Section 701(a)(1) of the Staggers Act (1) have now removed the Pending Appeal from this Court's jurisdiction and (2) have otherwise rendered that Pending Appeal moot, as discussed in Parts IA and IB of the Argument *infra*, respectively. The Statement (Pet. at 8) that "[a]voidance of inconsistent adjudications and piecemeal appellate review, judicial economy . . . mandate that the sole issue raised in this appeal (sic) should be determined in a single comprehensive proceeding, with the issues . . . in the direct appeal already pending before this Court" also fails to recognize that point, as discussed in Part II of the Argument *infra*.

ARGUMENT

The Milwaukee Road Trustee respectfully submits that a writ of certiorari should not issue for several independent and self-sufficient reasons:

First, the jurisdictional provisions of the Staggers Act amendments to the Rock Island Act effectively remove this entire controversy from the Court's jurisdiction, even as to the Pending Appeal, which should therefore be dismissed.

Second, the substantive provisions of the Staggers Act amendments to the Rock Island Act render the Pending Appeal moot. For that reason also, it should be dismissed. In turn, the pendency of an appeal that is subject to dismissal as being moot cannot be justified as the sole basis for asserting the Court's jurisdiction over the remaining parts of the "whole case."

Finally, to grant the Petition prior to intermediate review by the Court of Appeals, as an exercise of this Court's discretionary jurisdiction, would be to ignore the

clear Congressional mandate that the initial appellate review of both the Rock Island case and the Milwaukee Road case be conducted on a consolidated basis. Conversely, because the Pending Appeal in the Rock Island case is now subject to dismissal on either or both of the grounds stated above, there is no basis in policy for this Court to bypass an intermediate appellate review of related matters. Rather, the relevant policy considerations militate strongly in favor of denying the Petition.

I. The Staggers Act Amendments To The Rock Island Act Remove This Entire Controversy From The Court's Jurisdiction

A. The Staggers Act jurisdictional provisions apply with respect to the already pending appeal.

Petitioners' argument (Pet. at 8-10) that the Pending Appeal in the Rock Island controversy establishes the Court's primary appellate jurisdiction over the "whole case", including primary jurisdiction to review Judge McGarr's later October 15, 1980 Order, necessarily assumes that the Court has *continuing* primary jurisdiction over the Pending Appeal. *See* Pet. at 10-12.

However, the Staggers Act amendment replacing Section 124(a) of the Rock Island Act (Pet. App. J, p.j-1) unambiguously provides in part:

> Sec. 124 (a) Notwithstanding any other provisions of law, *any appeal* from —
>
> (1) *any decision* . . . with respect to the Constitutionality of any provision of this Act . . .
>
> (2) . . . shall be taken to the United States Court of Appeals for the Seventh Circuit. (Emphasis added)

That amendment effectively repeals the Court's primary appellate jurisdiction under 28 U.S.C. §1252, as applied to this entire controversy, including the Pending Appeal.[7]

Contrary to the Petitioners' suggestion (Pet. at 11, n. 4) there is nothing on the face of the Staggers Act amendment to Section 124(a) of the Rock Island Act (Pet. App. J, p. j-1) that limits applicability of that jurisdictional provision to appeals taken "*subsequent*" to its enactment. (Emphasis in the original) Apparently recognizing the weakness of their position in that regard, Petitioners advance the argument (Pet. at 9-12) that, for reasons of policy, such jurisdictional repeals should not be interpreted as applying to pending actions or appeals, absent express statutory language stating that they should so apply.[8] The correct rule of statutory construction is exactly the converse.

---

[7] We note, however, that the Staggers Act amendment does not remove the Court's jurisdiction under 28 U.S.C. §1252, or such other statutes as 28 U.S.C. §1257, to ultimately review the merits of the controversy at an appropriate later date, after the Seventh Circuit has conducted its intermediate appellate review provided for in the amendment, on a consolidated basis with the Milwaukee Road Appeal.

[8] Petitioners' suggestion (Pet. at 11) that an interpretation of the amendment, holding it applicable to pending appeals, raises "fundamental issues concerning the constitutional separation of powers and due process principles" is palpably without merit. That Congress has the constitutional authority to adjust the distribution and timing of jurisdiction among the various courts within the federal system, even as to pending cases, was long ago established in *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868). Petitioners further suggestion (Pet. at 12, n.5) that the continuing vitality of the decision in the *McCardle* case may now be subject to question fails to distinguish the very limited holding in that case from the broader sweep of the dicta set forth in the Court's opinion. It may be that the suggestion in the *McCardle* case, that Congress has the power to totally withdraw all jurisdictional means by which the Supreme

As stated in *De La Rama Steamship Co., Inc.* v. *United States,* 344 U.S. 386, 390 (1953):

> When the very purpose of Congress is to take away jurisdiction, of course it does not survive, *even as to pending suits,* unless expressly reserved. *Ex parte McCardle,* 7 Wall. 506, is the historic illustration of such a withdrawal of jurisdiction, of which less famous but equally clear examples are *Hollowell* v. *Commons,* 239 U.S. 506, and *Bruner* v. *United States,* 343 U.S. 112. If the aim is to destroy a tribunal or to take away cases from it, *there is no basis for finding saving exceptions unless they are made explicit.* (Emphasis added)

After tracing the long history of this fundamental principle and referring to several earlier decisions in which it had found repeated application, this Court concluded, in *Bruner* v. *United States,* 343 U.S. 112, 116-17 (1952):

> This rule — that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law — has, been adhered to consistently by this Court. (Footnote and extensive citations therein omitted).

Court might ultimately review the merits of already pending cases, is subject to question. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialcetic.* 66 Harv. L.Rev. 1362, 1364-65 (1953). However, in *Ex parte Yerger* 75 U.S. (8 Wall.) 85 (1868) the jurisdictional repeal at issue in the *McCardle* case was subsequently interpreted as having left intact the Supreme Court's discretionary power to review similar cases on petitions for habeas corpus and certiorari. Accordingly, the precise holding in the *McCardle* case merely establishes Congressional authority to limit the alternative jurisdictional means by which judicial consideration or review of a controversy might ultimately take place. The results in more recent cases, discussed in the succeeding paragraphs of this Part I A, confirm the continuing vitality of that principle, even as applied to pending controversies. *See also Glidden Co.* v. *Zdanok,* 370 U.S. 530, 567-68 (1962). The jurisdictional amendment in this case does no more. *See* n.7, *supra.*

See also Gwin v. *United States,* 184 U.S. 669, 675 (1902) and *Railroad Co.* v. *Grant,* 98 U.S. 398, 401 (1879) (both involving the repeal of Supreme Court jurisdictional statutes). The Petitioners' transparent attempt to turn this time-honored rule of statutory construction on its head cannot be allowed to succeed.

Application of the jurisdictional repeal in the Staggers Act to the Pending Appeal in this case is also "consonant with the overriding policy, historically encouraged by Congress, of minimizing the mandatory docket of this Court in the interest of sound judicial administration." *Gonzalez* v. *Automatic Employees Credit Union,* 419 U.S. 90, 98 (1974) (footnote omitted). That policy has been relied upon repeatedly as the basis for strictly construing the Court's mandatory jurisdiction under 28 U.S.C. §1253, which, like 28 U.S.C. §1252, provides for direct appeals from certain district court orders. *See, e.g. Allen* v. *State Board of Elections,* 393 U.S. 544, 561-62 (1969); *Swift & Co.* v. *Wickham,* 382 U.S. 111, 128-29 (1965); *Stainback* v. *Mo Hock Ke Lok Po,* 336 U.S. 368, 375 (1949); *Phillips* v. *United States,* 312 U.S. 246, 250-51 (1941). *See also Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 92 *et seq.* (1960) (Frankfurter, J., dissenting). Indeed, the valuable function that adherence to that policy serves, of enabling the Court to focus its attention on cases of great public importance, has been emphasized, not infrequently, by the individual Justices of this Court outside their written opinions. *See, e.g.,* June 22, 1978 letter from the nine Justices of this Court to Senator De Concini, endorsing certain proposed limitations on the Supreme Court's mandatory jurisdiction, *reprinted in* 125 Cong. Rec. S4140-41 (daily ed. April 9, 1979); Hon. John M. Harlan, *Manning The Dikes* (Some Comments on the Statutory Certiorari Jurisdiction and Jurisdictional State-

ment Practice of the Supreme Court of the United States), 13 Record of the Ass'n of the Bar of the City of New York 541, 558-61 (1958), *reprinted in* Hart and Wechsler, The Federal Courts and the Federal System 1605 (2d ed. 1973). Congress' response to those pleas, in this instance, should not be ignored by acceptance of Petitioners' suggested strict construction of legislation eliminating the Court's mandatory jurisdiction over direct appeals relating to the Rock Island and Milwaukee Road Acts.

Finally, rejection of the Petitioners' suggested strict construction of the Staggers Act jurisdictional limitation also enables intermediate review by the Court of Appeals of a case involving the complex relationship between the regulation of a highly technical industry and the relevant constitutional principles governing such regulation. The valuable refinement of issues that such intermediate review may provide in cases ultimately brought before this Court for final review has also been repeatedly relied upon by the Court in past decisions as a policy basis for the strict construction of jurisdictional provisions that, like the one in 28 U.S.C. §1252, provide for direct appeals to this Court from certain district court orders. *See, e.g., Allen* v. *State Board of Elections,* 393 U.S. 544, 561-62 (1969). *See also Florida Lime and Avocado Growers, Inc.* v. *Jacobsen,* 362 U.S. 73, 92-93 (1960) (Frankfurter, J., dissenting); *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 937, 938 (1952) (Burton, J., dissenting from grant of cert.). That policy dictates that the same result should obtain in this case.

B. The mootness of the pending appeal renders its subject to dismissal. It cannot, therefore, serve as the basis for the Court's jurisdiction over related matters.

At the time of Judge McGarr's June 9, 1980 Order, from which the Pending Appeal was taken, there was considerable doubt as to whether the Rock Island Act should be interpreted as preserving relief by way of a Court of Claims action to remove the purported constitutional deficiencies in the Act. *See* Excerpts from Transcript of Proceedings, June 20, 1980, appearing at Pet. App. E, p. e-5. *See also Railway Labor Executives' Association* v. *Gibbons* _____ U.S. _____, 100 S.Ct. 2668, 2671 (Stevens, J., as Circuit Justice 1980). Title VII, Section 701 (a)(1) of the Staggers Act (Pet. App. J., pp. j-1, *et seq.*) subsequently amended the Rock Island Act by replacing Section 124(c) of the Rock Island Act with a provision clarifying that such relief remains available thereunder. *See also* Section 701(a)(2) of the Staggers Act. That substantive amendment changed the relevant law under which Judge McGarr's June 9, 1980 Order had been entered,[9] rendering that injunctive Order and the Pending Appeal from it both moot. *Diffenderfer* v. *Central Baptist Curch of Miami, Florida,* 404 U.S. 412, 414 (1972) (per curiam); *Bryan* v. *Austin,* 354 U.S. 933 (1957) (per curiam); *United States* v. *Alaska Steamship Co.,* 253 U.S. 113, 115-16 (1920). The Pending Appeal should therefore be summarily dismissed.[10] *Id.*

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[9] In the *Regional Rail Reorganization Cases,* 419 U.S. 102 (1974), this Court held that relief by way of a Court of Claims action, when available, is sufficient to cure an otherwise constitutionally deficient uncompensated "taking" of the nature found by Judge McGarr in his June 9, 1980 Order (*See* Pet. at 5).

[10] The Milwaukee Road Trustee plans to file, as expeditiously as possible after the filing of this Brief, a Motion to Intervene in the Pending Appeal and will be submitting therewith, for filing in the event the first Motion is granted, a Motion to Dismiss the Pending Appeal.

Because the Pending Appeal is now moot and, therefore, subject to dismissal, it cannot be permitted to be used by Petitioners as a "bootstrap" to support the Court's jurisdiction over related matters as to which the Court is otherwise so clearly lacking jursdiction. In *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726 (1966), the Court pointed out that where the federal claims serving as the federal jurisdictional basis for pendent state claims are found to be insubstantial or are subject to dismissal on some other basis prior to trial, the entire case, including the pendent state claims, should be dismissed. By analogy, "pendent appeals" under the second paragraph in 28 U.S.C. §1252 should not be permitted to proceed where the principal appeal is subject to dismissal (*e.g.* as being moot) prior to consideration of the merits.

II. The Discretionary Grant Of The Petition Would Frustrate The Clear Congressional Mandate That The Similar Constitutional Issues Raised In Both The Milwaukee Road And Rock Island Cases Be Subject To Initial Appellate Review On A Consolidated Basis And Would Serve No Useful Function.

The Amendment in Title VII, Section 701(a)(1) of the Staggers Act, replacing former Section 124(b) of the Rock Island Act, unambiguously expresses Congress' intent that the similar constitutional issues raised by both the Milwaukee Road and Rock Island Seventh Circuit Appeals (and which the Petition seeks to bring before this Court) be subject to initial appellate review "in a consolidated proceeding." Petitioners' suggestion (Pet. at 13, n.6) that the Staggers Act jurisdictional provision does nothing to affect this Court's discretionary jurisdiction under 28 U.S.C. §1254(1) and §2101(e) conspicuous-

ly ignores that Congressional mandate. To grant the Petition prior to intermediate review, as an exercise of this Court's discretionary jurisdiction, would totally frustrate the clear Congressional intent that the two appeals be subject to a consolidated proceeding.[11]

The Milwaukee Road Trustee does not disagree with Petitioners' suggestion (Pet. at 15-16) that there are issues of great public importance involved in the merits of the Rock Island case. However, the Petitioners totally ignore that virtually the same issues of great public importance are also involved in the Milwaukee Road Appeal. Congress has taken the extraordinary step of mandating that the appellate review of the great issues in both the Rock Island and Milwaukee cases be provided on a consolidated basis, presumably so that the reviewing court may have as complete and comprehensive an understanding of these cases as can be made possible. The Petition seeks to frustrate that very substantial Congressional purpose by artifically fragmenting the deliberation and decision in these matters. Such a result is not only inconsistent with the most basic principles governing the separation of powers, but is contrary as well to the sound administration of justice.

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[11] Beyond the convenience it affords the parties to both the Milwaukee Road and Rock Island Seventh Circuit Appeals (see discussion in the statement of Interest of the Intervenor-Respondent/Amicus at 4 *supra*) that statutory procedure for consolidated proceedings before the Court of Appeals serves the very same policies of sound judicial administration that Petitioners discuss at length (Pet. at 13-15) in Part II of the Petition. Conversely, because the Pending Appeal is subject to dismissal on the grounds stated in Part IA (lack of appellate jurisdiction under 28 U.S.C. §1252) and Part IB (mootness) of the Argument *supra*, those policies of sound judicial administration do not support a discretionary grant of the Petition, as argued by Petitioners. Rather, for the reasons already stated, they militate strongly against such action.

CONCLUSION

For the foregoing reasons, any one of which should suffice, the Milwaukee Road Trustee submits that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 7, 1980

APPENDIX

APPENDIX A

Order (No. 286) And Attached Decision Of The United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor.*

In Proceedings for the Reorganization of a Railroad

No. 77 B 8999

February 7, 1980

Trustee's motions of Nov. 1, 1979 to borrow $75 million from the F.R.A. to finance a labor protection settlement program & of Jan. 3, 1980 for a hearing & approval of the specific agreement are granted, & he may serve & present an appropriate order. (Decision attached)

/s/ McMILLEN, J.

DECISION ON EMPLOYEE PROTECTION AGREEMENT

The Trustee filed a motion dated November 1, 1979 seeking authority to borrow up to $75 million from the Federal Railroad Administration to finance a labor protection settlement program. The funds were sought for the purpose of satisfying claims of terminated employees if and when the Trustee's reorganization plan went into effect. On November 4, 1979, the President signed P.L. 96-101, commonly known as the Milwaukee Railroad Restructuring Act, by which an employee protection agreement was mandated by Section 9. Therefore, the Trustee's motion to borrow funds will now be considered in the context of an agreement covered by that

Act. Section 15 of the statute provides that a loan of $75 million will be guaranteed by the Secretary of Transportation to finance the agreement and that any obligation guaranteed for this purpose will be "treated as an administrative expense of the estate." Claims of the individual employees filed pursuant to the agreement are to be paid as administrative expenses pursuant to Section 9(d).

After the M.R.R.A. went into effect, the Trustee did negotiate an employee protection agreement with various labor organizations representing his employees. Thereafter, by a motion filed January 3, 1980, he asked for a hearing and approval of the specific agreement, and such a hearing was held on January 10, 1980 on both motions.

In ruling on these two motions, the provisions of Sections 9 and 15 of P.L. 96-101 are intimately involved. We will not reproduce the specific sections herein, however, because the entire Act is attached to our decision of November 23, 1979, and Sections 9 and 15 are now codified at 45 U.S.C. § 908 and § 914. A decision on the Trustee's motions is considerably facilitated by the bench marks already established by our previous decisions and by the decision of the Seventh Circuit Court of Appeals in this case (Nos. 79-1494, -1675, -1683, and -1698) dated October 2, 1979). We have concluded on the basis of the record that the pertinent provisions of Sections 9 and 15 of P.L. 96-101 are not unconstitutional and that they offer the Trustee and the creditors a felicitous method of satisfying the claims of those employees who are dislocated by the restructuring of the railroad. The Trustee used sound business judgment in taking advantage of Congress' proffer in this instance.

Several parties have filed objections to the Trustee's motions. We find nothing in the M.R.R.A. which requires this agreement to be approved or even grants us the power to do so. Had a plan not been negotiated, the Conference Report contains the specific provisions which the managers of the bill desired. *United States Code Congressional & Administrative News* (Nov. 1979) pp. 3326-29. The court's

approval is necessary for borrowing the $75 million, and particularly for determining whether it can properly be made a cost of administration under Section 15(b) but the details of the agreement, and whether it is fair and equitable to the employees, as distinguished from the creditors, are not of primary concern to this court.

We find and conclude that the Trustee complied with the requirements of Section 9(a) by negotiating the agreement in question, even though it may be put into effect before a reorganization plan has been acted upon and even though it may not take care of all the claims of employees who are eventually separated or transferred in restructuring the railroad. The agreement also does not cover claims which might be made under the plan in the event the entire railroad operation is discontinued. All that the trustee can do under P.L. 96-101 is to negotiate an agreement which is "fair and equitable" in the restructuring effort. The agreement which has been filed is estimated to divide the $75 million among the employees who are expected to file claims, in the hope that this will take care of most of those who are dislocated by the implementation of Milwaukee II and will avoid litigating their claims.

Some of the objectors contend that any employee protection plan is premature and should be delayed until a reorganization plan has been approved. There is certainly nothing in P.L. 96-101 which so indicates, and in fact the statute itself contemplates that abandonments and restructuring may take place before any reorganization plan is approved. Congress clearly contemplated in enacting P.L. 96-101 that the Milwaukee Railroad would be restructured for continued operation (Section 2), prohibited directed service by another line until April 1, 1981, (Section 18), provided for expedited abandonment and sales (Section 5) and specifically required the Trustee to negotiate an employee protection agreement on a very short time schedule. The maximum time allowed for this purpose was "immediately" after the National Mediation Board failed to obtain such an agreement

during the 40 days following the effective date of the Act which was November 4, 1979. Thus the M.R.R.A. within its four corners makes it quite apparent that an employee protection agreement was to be executed and put into effect to take care of employee claims as soon as any abandonments or transfers occurred. Several petitions for abandonment or for sales are now under advisement and will soon be acted upon. To delay severance or other aid to employees who are dislocated by such changes would not only defeat the intent of Congress but would also cause severe economic and morale problems among the employees.

Objectors argue that to approve and put into effect an employee protection agreement is anticipating approval of a reorganization plan, which should not be done prematurely or piece-meal. In view of the expedited step-by-step procedure toward restructuring contemplated and facilitated by the M.R.R.A., we see no violation of Section 77 of the Bankruptcy Act by this procedure. On the contrary, if an employee protection program were not in effect as soon as needed for the abandonments and other pre-plan changes contemplated by the M.R.R.A., the possibility of an effective reorganization plan as contemplated by Section 77 could be seriously impaired. The Trustee might be hindered by labor organizations in his effort to effectuate major abandonments or sales unless employee claims for severance pay or relocation are promptly liquidated. Furthermore, if past experience is any guide, it will consume some time to negotiate a satisfactory loan agreement with the F.R.A., and by that time a substantial number of sales or transfers are expected to be consummated. Thus, even though an employee protection agreement does anticipate and facilitate a reorganization plan, this clearly does not violate the M.R.R.A. or Section 77 of the Bankruptcy Act.

A question has also been raised concerning the rights of employees who may be terminated or transferred after the $75 million has been paid out. Such an eventuality is possible but not predictable. At present, the Trustee and the court expect

the Milwaukee Railroad to continue operation on a reduced scale indefinitely. The Trustee cannot make an accurate computation of the number or dollar amount of claims which will be filed under the agreement, partly because acceptance of the benefits are voluntary on the part of the affected employees and partly because the total amount of claims will depend on whether presently undesignated employees accept transfers in lieu of termination. The best estimate of both the Trustee and the labor unions is that the available $75 million will pay the claims which will be filed if the reorganization plan for Milwaukee II goes into effect substantially as now proposed. This judgment properly assumes that the benefits available under the plan will be accepted by all or most of the affected employees because the alternative of filing a claim against the estate is less attractive. The terms of the agreement do not bind the estate beyond the $75 million which is now available (Section 5(e)(2) and Section 9(f)). If the $75 million is not sufficient and if Congress or the F.R.A. refuses to provide more funds to the Trustee for employee protection, then the remaining employees will be relegated to their claims against the estate. Since such claims cannot have greater priority than claims under the agreement, the creditors will not be prejudiced by this alternative.

If the entire railroad must ultimately be abandoned, then laborers' claims could apparently amount to as much as $400 million. The priority of such claims has not been determined in this case or in any other litigation so far as we have been advised by the objectors. In any event, employees who file claims against the estate might obtain more but might obtain less than those who file claims under the employee protection agreement. It is clear, however, that the former group will not be paid as promptly as the latter. We rely upon the ability of the labor unions to protect the interests of their members in negotiating this agreement, and beyond that we do not believe it becomes necessary or appropriate to speculate as to what may be in the best interest of individual employees.

Nor can we find with mathematical certainty whether the creditors will be benefitted by the agreement. Perhaps the

most substantial objection which has been made to the Trustee's motions is that Sections 9 and 15(b) violate Article I, Section 8, Clause 4 of the United States Constitution because they constitute a non-uniform bankruptcy statute. We have previously considered such an objection to Sections 6, 7 and 22 of the statute in our decision of November 23, 1979 and have concluded that the uniformity provision of the Constitution is properly restricted to a region or to the creditors of a particular estate (Decision pp. 3-7). Certainly the effect of requiring $75 million to be a cost of administration affects all creditors of this estate, and it may amend the ultimate reorganization plan accordingly. However, no other railroad in this geographical area is subject to the employee protection provisions of this statute, and the creditors of no other estate will be affected by this priority. Therefore, Section 9 and Section 15(b) of the M.R.R.A. are "uniform" in a constitutional sense. *Vanston Bondholder Protective Committee* v. *Green*, 329 U.S. 156, 172 (1946).

Furthermore, none of the objectors have shown that they will be prejudiced by these provisions, since a potential $400 million claim of undetermined priority is being substantially reduced, yet being granted the statutory priority of an administrative expense. We believe Congress has the power to do this. Cf. *Carpenter* v. *Wabash Railway Co. et al.*, 309 U.S. 23 (1940). However, if it turns out that the $75 million of claims have been given an unconstitutional preference, then the government's loan will be relegated to its proper priority under the reorganization plan. In short, the possible unconstitutionality of Section 15(b) is no ground for denying the Trustee's motion to borrow $75 million. If claims which are paid under Section 9(d) constitute an unconstitutional preference, the creditors have their remedy under the Tucker Act. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 126-127 (1974).

Finally, the common stockholders and some of the secured creditors contend that their interests are being unconstitutionally eroded by the priority granted in Section

15(b). We have dealt with this argument several times in the past, once since the M.R.R.A.'s abandonment provisions became effective (Decision of January 16, 1980 approving borrowing for rehabilitation and repair). Suffice it to say that the Trustee may borrow money for proper business purposes so long as reorganization is "possible," even though, during the period when a reorganization plan is under consideration and is being implemented, the equity of the estate is being used for continuing the operations. *Matter of Chicago, Rock Island and Pacific R. Co.*, 545 F.2d 1087 (7th Cir. 1976).

We find and conclude that the Trustee's employee protection agreement filed with his motion on January 3, 1980 is fair and equitable to the estate. Even though Section 9(c)(1) of the M.R.R.A. does not make this plan subject to the court's approval, we recognize a responsibility to the creditors and to the public to see that the Trustee does not make wasteful or improvident financial commitments. The agreement in this case was freely negotiated with the labor organizations as mandated by P.L. 96-101, avoiding the necessity of any intervention by the National Mediation Board, or by the Congress. The Trustee has reduced the estate's potential obligation by this agreement and has provided benefits for his employees which the unions believe to be fair and equitable and which will facilitate the abandonment or transfer of undesirable portions of the railroad's system. We see no practical alternative to the negotiation of such a plan, and, since it appears reasonably likely to be implemented within the $75 million limit during the restructuring of the Milwaukee Railroad, it is a fair and equitable trade-off for the creditors.

Therefore the Trustee's motions of November 1, 1979 and January 3, 1980 are granted, and he may serve and present an appropriate order.

ENTER:

/s/ THOMAS R. MCMILLEN
Judge, U.S. District Court

DATED: Feb. 7, 1980

APPENDIX B
Notice Of Appeal To The United States Court Of Appeals For The Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
In the Matter of:
CHICAGO, MILWAUKEE, ST. PAUL
AND PACIFIC RAILROAD COMPANY, *Debtor.*
In Proceedings for the Reorganization of a Railroad
No. 77-B-8999

JOINT NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Chicago, Milwaukee, St. Paul and Pacific Railroad Company, Debtor and Chicago Milwaukee Corporation, a corporation, principal stockholder, hereby jointly appeal to the United States Court of Appeals for the Seventh Circuit from the following order:

1. Order Number 286 dated February 7, 1980 and docketed February 8, 1980, granting the trustee's motions to borrow $75 million from the Federal Railroad Administration

to finance a labor protection settlement program and for approval of the specific labor protection agreement.

DATED: March 7, 1980

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stockholder

APPENDIX C

Excerpts From The Milwaukee Railroad Restructuring Act

A. Section 9, 45 U.S.C.A. §908

EMPLOYEE PROTECTION AGREEMENTS — AGREEMENT BETWEEN MILWAUKEE RAILROAD AND LABOR ORGANIZATIONS

SEC. 9(a) The Milwaukee Railroad and labor organizations representing the employees of such railroad may, not later than 20 days after November 4, 1979, enter into an agreement providing protection for employees of such railroad who are adversely affected as a result of a reduction in service by such railroad or a restructuring transaction carried out by such railroad. Such employee protection may include, but need not be limited to, interim employee assistance, moving expenses, employee relocation incentive compensation, and separation allowances.

(b) If the Milwaukee Railroad and the labor organizations representing the employees of such railroad are unable to enter into an employee protection agreement under subsection (a) of this section within 20 days after November 4, 1979, the parties shall immediately submit the matter to the National Mediation Board. The National Mediation Board shall attempt, by mediation, to bring the parties into an agreement with respect to employee protection no later than 40 days after November 4, 1979.

(c)(1) If the National Mediation Board is unable to bring the parties to an agreement under subsection (b) of this section within 40 days after November 4, 1979, the Milwaukee Railroad and the labor organizations representing the employees of such railroad shall immediately enter into an employee protection agreement that is fair and equitable.

(2) If an employee protection agreement is entered into under this subsection, any claim of an employee for benefits and allowances under such agreement shall be filed with the Board in such time and manner as the Board by regulation

shall prescribe. The Board shall determine the amount for which such employee is eligible under such agreement and shall certify such amount to the Milwaukee Railroad for payment.

(d) Benefits and allowances under an employee protection agreement entered into under this section shall be paid by the Milwaukee Railroad in accordance with section 914 of this title, and claims of employees for such benefits and allowances shall be treated as administrative expenses of the estate of the Milwaukee Railroad.

* * *

B. Section 13, 45 U.S.C.A. §912

ELECTION

SEC. 13 Any employee who receives any assistance under section 909 or section 911 of this title or under an employee protection agreement entered into under section 908 of this title shall be deemed to waive any employee protection benefits otherwise available to such employee under the Bankruptcy Act, subtitle IV of Title 49, or any applicable contract or agreement.

* * *

C. Section 15, 45 U.S.C.A. §914

OBLIGATION GUARANTEES — AUTHORIZATION

SEC. 15(a) The Secretary of Transportation, under the authority of section 831 of this title, shall guarantee obligations of the Milwaukee Railroad for purposes of providing employee protection in accordance with the terms of the employee protection agreement entered into under section 908 of this title. Guarantees under this section shall be entered into without regard to the requirements of subsection (g) of section 831 of this title.

(b) Any obligation guaranteed pursuant to this section shall be treated as an administrative expense of the estate of the Milwaukee Railroad.

(c) The aggregate unpaid principal amount of obligations which may be guaranteed by the Secretary pursuant to this section shall not exceed $75,000,000.

(d) The total liability of the Milwaukee Railroad in connection with benefits and allowances provided under an employee protection agreement entered into under section 908 of this title shall not exceed $75,000,000.

(e) Except in connection with obligations guaranteed under this section, the United States shall incur no liability in connection with any employee protection agreement entered into under section 908 of this title.

(f) Section 836 of this title shall not apply to any obligation guaranteed under this section.

APPENDIX D
Order Of The United States Court Of Appeals For The Seventh Circuit November 3, 1980

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
AMENDED ORDER*
November 3, 1980

By the Court:
No. 80-1346

IN THE MATTER OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor,*

APPEALS OF:
CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, *Debtor* AND CHICAGO MILWAUKEE CORPORATION, a corporation, principal stockholder.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-B-8999
THOMAS R. MCMILLEN, JUDGE

No. 80-2487
IN THE MATTER OF;
CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, *Debtor,*
APPEAL OF:

RAILWAY LABOR EXECUTIVE'S ASSOCIATION.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 75-B-2697
FRANK J. MCGARR, JUDGE

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* The court's order of October 23, 1980, was wrongly captioned. That order is vacated.

ORDER

The Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company has moved to consolidate Appeal No. 80-1346 and 80-2487 or, in the alternative, for leave to intervene as an amicus curiae in Appeal No. 80-2487. After reviewing the motion and the attached exhibits, the Court DENIES the motion to consolidate Appeal No. 80-2487 with Appeal No. 80-1346, and GRANTS the Trustee leave to file as amicus curiae in Appeal No. 80-2487 for the purpose of filing briefs.

APPENDIX E
Order Of The United States Court Of Appeals For The Seventh Circuit
November 3, 1980

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
November 3, 1980
By the Court:
No. 80-2487
In the Matter of:
CHICAGO, ROCK ISLAND AND
PACIFIC RAILROAD COMPANY, *Debtor,*
Appeal Of:

RAILWAY LABOR EXECUTIVE'S ASSOCIATION.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 75-B-2697
FRANK J. MCGARR, JUDGE

This matter comes before the Court for its consideration upon the filing of the following documents:

1. "MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CERTIFY THE QUESTION ON THIS APPEAL TO THE UNITED STATES SUPREME COURT" filed herein on October 25, 1980 by counsel for the Trustee of the Chicago, Rock Island and Pacific Railroad Company.

2. "MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS OR CERTIFY" filed herein on October 31, 1980 by counsel for Richard B. Ogilvie as Trustee of the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, as amicus curiae.

3. "SUBMISSION OF BRIEF BY RICHARD B. OLILVIE, TRUSTEE OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN SUPPORT OF APPELLANTS AND MOTION TO FILE OVERSIZE BRIEF" filed herein on October 28, 1980.

On consideration thereof,

IT IS ORDERED that the "MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO CERTIFY THE QUESTION ON THIS APPEAL TO THE UNITED STATES SUPREME COURT" shall be taken with the case. Counsel for the Trustee shall file an additional 21 copies of this motion for distribution to the full court. Appellant may respond to this motion in its reply brief.

IT IS FURTHER ORDERED that the "MOTION FOR EXTENSION OF TIME TO RESPOND TO MOTION TO DISMISS OR CERTIFY," treated as a motion for leave to respond to the motion to dismiss is hereby DENIED. The amicus curiae motion suggests no interest that it has in the questions raised by the motion to dismiss.

IT IS ALSO FURTHER ORDERED that the "SUBMISSION OF BRIEF BY RICHARD B. OGILVIE, TRUSTEE OF THE CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, IN SUPPORT OF APPELLANTS AND MOTION TO FILE OVERSIZE BRIEF" is hereby GRANTED.